87-794

No. .....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

CHARLES PENMAN,
Petitioner,

VS.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA AND THE PUBLICISTS, LOCAL 818,
Respondent.

On Appeal from the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

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EDITOR'S NOTE

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QUESTION PRESENTED

Did the state courts violate federal labor policy by summarily dismissing Petitioner's breach of fair representation and equitable estoppel action against his union, Respondent, after Respondent prevented Petitioner from arbitrating his discharge grievance by fraudulent misrepresentations based on uncontradicted evidence of a conspiracy between Respondent and Petitioner's employer?

LIST OF PARTIES

The list of parties is identical to the caption of the proceeding. Although Warner Brothers Inc. appeared in the caption of the decision on appeal (Appendix "A," *infra*), it was never a party to this appeal.

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Petitioner Charles Penman respectively prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three (hereinafter called "the Court of Appeal") entered in this proceeding on May 27, 1987.

OPINIONS BELOW

The opinion of the Court of Appeal, which was not certified for publication, appears as Appendix "A" hereto. The Minute Order of the Superior Court of California (hereinafter called "the Superior Court") which was affirmed by the Court of Appeal, appears as Appendix "B" hereto.

JURISDICTION

The judgment of the Court of Appeal was entered on May 27, 1987. A timely petition for review to the Supreme Court of California was denied August 12, 1987. (See Appendix "C" attached hereto). Jurisdiction is invoked on the basis that the Petition involves a question of federal labor policy under Section 301 of the Labor Management Relations Act of 1947 as amended ("LMRA")[1] and the corollary duty on the part of collective bargaining representatives to represent members without hostility toward any, to exercise discretion with complete good faith and honesty, and to avoid arbitrary conduct[2] and to refrain from equitable estoppel.[3]

STATUTORY PROVISIONS INVOLVED

Suits By And Against Labor Organizations.

Section 185, United States Code, Title 29,

> (a) Suits for violation of contracts between an employer and a labor organization representing employ-

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[1]29 U.S.C. Section 185(a).

[2]*Vaca v. Sipes*, 386 U.S. 171 (1967).

[3]*Hass v. Darigold Products Co.*, 751 F.2d 1096, 1099-1100 (9th Cir. 1985); *Acri v. International Association of Machinists and Aerospace Workers*, 781 F.2d 1393 (9th Cir. 1986).

ees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or the citizenship of the parties.

STATEMENT OF THE CASE

A. Petitioner's Employment With Warner Brothers.

From 1973 and until his discharge on August 31, 1979, Petitioner was employed by Warner Brothers, Inc. (hereinafter called "WBI"). After positions in the mailroom, in August 1978, Petitioner was transferred to WBI's publicity department and became a publicist. In that position he was covered by a collective bargaining agreement negotiated by Respondent and a multiemployer association, Association of Motion Picture and Television Producers, Inc. (hereinafter called "AMPTP") which represents WBI and other movie studios.

Petitioner contends that there were no particular complaints about his work. His supervisor, Roger Arnow, appraised his work in December 1978 and rated Petitioner with fours and fives on a scale of one to five, with five being best. Although Arnow rated Petitioner only two in "job knowledge", Arnow explained in the appraisal form apologetically that he had not been able to train Petitioner because of Arnow's workload. (C.T. 420-427.)[4]

Shortly before his 1979 summer vacation, Petitioner, a native Costa Rican, received a letter from Rodrigo Castro-Echeverria, then the Los Angeles Consul General of Costa Rica:

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[4]The page references which follow are preceded by the designation "C.T." for the "Clerk's Transcript."

> "On behalf of the Chief of Staff and Private Secretary to the Minister of Foreign Affairs, Mr. Carlos Aguilar Calderon, I am honored to extend a most cordial invitation to you and your lovely wife to visit Costa Rica.
>
> Your judgment and abilities have been an immense contribution to enhance the name of your native country; and I am certain that as a United States citizen you have given the utmost of your capacities to Warner Brothers as well.
>
> It is with great satisfaction that we are able to recognize your accomplishments by this invitation.
>
> Kindly reply at your earliest convenience." (C.T. 429.)

Immediately upon receiving the letter, Petitioner sent a copy to WBI's Chairman of the Board, Ted Ashley, together with the following transmittal memorandum:

> "Enclosed is a copy of a letter I received from the General Consul (sic) of Costa Rica. I am very flattered with his invitation, and have responded affirmatively.
>
> As you know, Costa Rica is a model of a democracy worldwide. I am certain a personal message from the Chairman of the Board of Warner Bros. to the Chief of Staff, and the Minister of Foreign Affairs would be most graciously received.
>
> Your comments would be respectfully accepted." (C.T. 430.)

For the next two weeks Petitioner and his wife went on vacation to Iowa. When Petitioner returned to WBI on Monday, August 20, 1979, Arnow refused to give him any work assignments. Later, after receiving a telephone message to contact the personnel department, Petitioner

asked Arnow why they were calling him. Arnow replied Warner Brothers no longer needed his services, that the "letter had aggravated everybody" and that the Personnel Department would inform him why. Arnow also suggested that Petitioner quit his job rather than be fired, otherwise he could never work on the lot again (C.T. 421). Shortly before the latter conversation, Dennis Tange, a management employee at WBI, had tipped off Petitioner that Johnny Friedkin, a WBI vice-president "was very upset" and that "I should never have written that letter to Ashley" (C.T. 421).

On the following day Petitioner met with Adrienne Gary, director of human resources of WBI, who advised Petitioner that charges had been made against him and that he had two choices, either quit or be fired, that he had been accused of taking too much time off to renew his passport and taking too much time off to get haircuts and that he was arrogant and disrespectful. Petitioner inquired about his letter to Ashley. Gary replied Arnow had mentioned the letter to her but "she had informed him that he could not fire me for sending the letter." Petitioner asked for copies of the written charges so that he would have a chance to rebut them. Gary said she would give him a copy and 48 hours to reply and added that if Petitioner quit his job she could get him back in the mail room where he worked before his publicist job. Later in the day, as Penman received Arnow's copy of the written charges against Petitioner, Arnow accused Penman of "stabbing him in the back" for wanting to write a rebuttal (C.T. 421-422).

Petitioner eventually received a 5 page list of reasons for his proposed employment termination[5] (C.T. 431-435) which he proceeded to rebut with his own 6 page memo-

[5]The list included the reasons mentioned by Gary.

randum (C.T. 436-441). On August 27, 1979, in a meeting with Petitioner, Gary said she could not fire him based on his statement but gave him three days off until August 31, 1979 when she would ask him to sign a statement. In their August 31, 1979 meeting, Gary asked Petitioner to sign a statement agreeing "that my termination is a layoff due to completion of my assignment" and agreeing that he was being "laid off" and that if he signed the statement he would receive his final check. (C.T. 442.) Petitioner refused to sign the statement because it was false in that he had no understanding about a layoff. Petitioner left Gary's office without signing the statement and without his final paychecks on the understanding that he was discharged.

B. Petitioner's Attempts to Grieve and Arbitrate His Discharge And The Collective Bargaining Agreements.

Approximately one week before his final discharge, Petitioner had consulted Respondent's business agent, Mac St. Johns, who informed Petitioner he was aware of the impending discharge. St. Johns provided no particular assistance but he exhorted Petitioner to turn in his rebuttal to Gary within 48 hours. (C.T. 423-424.) Later, on the day of Petitioner's final discharge, St. Johns told Petitioner's wife, Bonnie Penman,[6] that Gary had told him that Petitioner would not sign the "release" statement. St. Johns demanded that she tell Petitioner to sign it. (C.T. 527-528.)

The following week Petitioner retained a private attorney, Clarence Lowe, Jr., who drafted a written grievance which was delivered to St. Johns for handling with WBI. (C.T. 424) Lowe's grievance and the subsequent grievance filed by St. Johns (C.T. 317-319) asked WBI for

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[6]An employee of The Burbank Studios, a WBI affiliate.

Petitioner's reinstatement and back pay. Lowe and St. Johns then held meetings and corresponded concerning the details of taking Petitioner's grievance to arbitration. (C.T. 320)

On August 1, 1979, one month before WBI discharged Petitioner, the labor agreement which covered WBI's publicists expired. This agreement (hereinafter called "the 1976-79 Agreement") had a term from 1976 to 1979. The first paragraph of Article 7, entitled "Grievance Procedure" provided:

> "In the event of any dispute between the Local Union or any of the persons subject to this Agreement and the Producer with regard to wage scales, hours of employment or working conditions or with regard to the interpretation of this Agreement concerning such provisions, the procedure, unless otherwise specifically provided herein, shall be as follows:" (C.T. 335)

after which was a three step procedure culminating in arbitration. Article 68(c) of the 1976-79 Agreement's seniority provisions contained a subparagraph entitled "Discharge by the Producer for Cause" (C.T. 355) which provided that a producer may remove a person from the Industry Experience Roster "for cause" after which it would notify the employee and Respondent in writing concerning the "cause".

While St. Johns was corresponding with WBI concerning a settlement or arbitration of Petitioner's grievance, St. Johns informed Lowe he thought an arbitrator would rule against Petitioner's grievance because Petitioner's employment with WBI was only on a "week to week" basis. (C.T. 320) Lowe expressed concern to St. Johns about Petitioner's chances to prevail in an arbitration cause but for a different reason. In his October 26, 1979 letter, Lowe asked St. Johns to postpone a scheduled

arbitration hearing for Petitioner and expressed concern about the affect some prior arbitration decision on a similar issue might have on Petitioner's grievance. Under Article 68(c) of the old collective bargaining agreement, in another studio case an arbitrator had not applied a "just cause" requirement to a discharged employee because the employer had not removed his name from the Industry Experience Roster. Because the Roster was no longer in effect, this raised the question as to whether Lowe could somehow argue any retention of a "just cause" requirement respecting Petitioner within the contract. Lowe asked St. Johns for a copy of the new collective bargaining agreement then being negotiated and other arbitration decisions regarding a similar interpretation. (C.T. 322-323)

At that time, the new collective bargaining agreement between Respondent and AMPTP was being negotiated but still had not been executed. However, a Memorandum of Agreement which modified the 1976-79 Agreement between Respondent and AMPTP was prepared and executed by AMPTP and various members on December 17 and 19, 1979. (C.T. 458) This Agreement, hereinafter referred to as the 1979-82 Agreement was *effective August 1, 1979*, and deleted "[A]ny and all references to the Industry Experience Roster" (C.T. 453). Particularly notable was the insertion of "(*including discharges for cause*)" directly following "working conditions" in Article 7 as an arbitrable subject retroactively. (C.T. 453)

In St. John's next letter to Lowe dated November 13, 1979, St. Johns ignored Lowe's October 26, 1979, letter request for the new contract and the questions concerning the contract interpretation problem he had raised. (C.T. 324)

On November 27, 1979 Lowe wrote St. Johns again:

"In response to your letter of November 13, 1979, it is apparent to me that we are not going to be able to schedule this arbitration until you can provide me with a copy of the 1979 Collective Bargaining Agreement covering Mr. Penman's employment with Warner Brothers. Inasmuch as his termination is governed by that agreement, it would be useless for us to attempt to schedule an arbitration hearing until that agreement is available.

Would you please advise me when I may expect to obtain a copy of the 1979 Agreement as well as copies of the arbitration decisions which I requested in my last letter to you. Would you please also advise the AMPTP of the reasons for the delay in scheduling this hearing. Thank you for your assistance and cooperation to date and your anticipated cooperation in this matter." (C.T. 447)

Thereafter on December 18, 1979, St. Johns wrote Lowe:

"Enclosed is the Arbitration ruling you requested.

As far as a new producers' contract goes, in comparison to the old, the change is that the entire Article 68 has been eliminated from our contract. Grieving or arbitrating for persons 'fired for cause' comes under Article 7 of the old contract.

It will be some weeks before we get a complete copy of the new contract but *as far as I can see there is no substantial change in the Charles Penman situation with regards to the arbitration between articles you have and the new one.*" (C.T. 448; Emphasis supplied)

No other correspondence was exchanged between the parties until St. Johns' parting February 28, 1980 letter to Petitioner in which St. Johns said he could see no

grounds for another separate grievance Petitioner had proposed.

> "I can't seem to make you or your lawyer understand that there is no assurance of employment, except weekly, in the Guild's contract; or, for that matter, in most contracts with the producers, except, of course, in the case of personal service agreements between the person and the company."

St. Johns' remarked that if they were going to go ahead with the expedited arbitration they had better do it. (C.T. 325) There was no other response. St. Johns never mailed the new agreement to Lowe.

Lowe never followed through to arbitrate Petitioner's grievance. Instead, he filed a wrongful discharge action against WBI together with a national origin discrimination count. Later he amended the Complaint to include Respondent's acts of breach of fair representation.

Unknown at the time to Penman and Lowe, and not learned until sometime during discovery, a WBI Interoffice Memorandum dated September 6, 1979 from Gary to Jay Ballance, a WBI vice-president, (C.T. 472) reported that St. Johns had told Gary that he had received Petitioner's discharge grievance and that:

> "*Mac informs me that he has to go through the motions of filing this Grievance* or else Charles Penman will sue him and the union for non-representation.
>
> Mac also informs me that Charles Penman is claiming that he was laid off because of his ethnic origin. You may be aware that Charles is Costa Rican. He is listed as Hispanic on my computer run.
>
> *Mac is supporting us, and has all along, but wanted us to be aware of the process.*" (Emphasis supplied).

Gary learned about St. Johns' intentions to "go through the motions" of filing this grievance during a lunch meeting. (C.T. 468-470)

Not only did St. Johns pledge support to Gary but also during discovery, on June 19, 1985, when WBI produced Penman's personnel file for Gary's deposition, Penman saw copies of St. Johns' October 12, 1979 letter to Lowe, Lowe's October 26, 1979 letter to St. Johns, St. Johns' November 27, 1979 letter to Penman, and St. Johns' December 18, 1979 letter to Lowe in his file. St. Johns had obviously supplied copies of these supposedly confidential letters to WBI. (C.T. 424-425)

Although St. Johns warned Lowe several times that Petitioner's employment was only "week to week" there is nothing in either the 1976-79 Agreement or the 1979-82 Agreement which provides for "week to week" employment. The only provision cited by Gary on this point was the paragraph that covered wage rates and which simply provided that employees are paid weekly. (C.T. 465-466)

Lowe died in February 1985 (CT 480). Respondent's Motion For Summary Judgment was filed July 2, 1985. (C.T. 135)

C. Treatment Of Federal Questions Sought To Be Reviewed.

In his First Amended Complaint, Petitioner charged WBI with (1) national origin discrimination under 42 U.S.C. Section 1981, (2) unlawful retaliation, (3) the tort of wrongful discharge and (4) breach of implied covenant of good faith and fair dealing. In addition, Petitioner charged Respondent with arbitrarily and capriciously failing to represent him. Petitioner alleged he "decided it would be futile to prosecute said grievance pursuant to said collective bargaining agreement because Respondent said the employer's termination of the plaintiff without

cause was not prohibited by the collective bargaining agreement." (C.T. 13, Paragraph 47) Respondent's Answer to the First Amended Complaint included as a second affirmative defense that Respondent had "failed to follow the contractual remedies available under the Collective Bargaining Agreement and to have his claim of unlawful discharge heard by an impartial arbitrator in accordance with the Grievance and Arbitration Procedures of the Agreement." (C.T. 20, lines 12-17)

Later the Superior Court permitted the filing of a Second Amended Complaint alleging, in addition to the prior counts, an alternative theory that if WBI did not commit the tort of wrongful discharge or the breach of implied covenant of good faith and fair dealing under state law in discharging Petitioner, it wrongfully discharged Petitioner under the collective bargaining agreement with Respondent and accused Respondent of breaching its duty of fair representation in that Respondent never informed Petitioner about the changes in the new 1979-1982 Agreement which added "discharges for cause" as a subject of arbitration free from the restrictions under the old contract which had limited discharges for cause as an arbitrable dispute only for employees removed from the Industry Experience Roster. Because Respondent represented to Petitioner and his attorney that Petitioner's rights were unaffected by the new contract, Petitioner bypassed arbitration based on representations there were no particular changes in the contract and Respondent's concealment from Petitioner about the radical changes in the 1979-82 Agreement as compared to the 1976-79 Agreement which now gave discharged employees under Article 7 the right to have their discharges tested by a "cause" standard. Such misrepresentations and concealments, Petitioner alleged, constituted both a (1) breach of duty of fair representation and (2) equitable estoppel. (C.T. 640-645)

On August 29, 1985 the Superior Court granted Respondent's Motion For Summary Judgment. The decision did not attempt to resolve the question of whether or not WBI actually had cause for discharge and avoided such question. Instead, the Superior Court ruled that there was no triable issue of material fact that the 1979-82 Agreement became effective retroactively back to August 1, 1979 and that Petitioner "through his own legal counsel elected not to exhaust the contractual remedies, including arbitration" and that such failure to exhaust "was a conscious decision based upon an evaluation of the chances of success of the claim and was not based on any matters stated by union representatives or any delay in obtaining a copy of the 1979 collective bargaining agreement." (C.T. 648)

The ruling also held there was "no triable issue as to the material fact that the 1979 collective bargaining agreement became effective as pf (sic) August 1, 1979 and governed the question of plaintiff's discharge and that plaintiff, through his own legal counsel, elected not to exhaust the contractual remedies, including arbitration, provided thereby." (App. B-1) The latter ruling that the 1979-82 Agreement governed Petitioner's discharge, of course, effectively preempted any state wrongful discharge action advanced by Petitioner. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

In its May 12, 1987 decision, the Court of Appeal arrived at two principal conclusions: (1) The phrase "including discharge for cause" inserted into Article 7 of the 1979-82 Agreement was merely "surplusage and should not be entitled to any significance" and the "only *substantive right* an employee had to be discharged for *cause* was deleted from the 1979-1982 agreement totally." (Emphasis theirs; App. "A", p. 10,). (2) While St. Johns' information was misleading, there was "no showing of

fraudulent concealment, or of unfair, dishonest or egregious conduct by him" but only "simple negligence". (App. "A", pp. 13-16)

REASONS FOR ALLOWING THE WRIT

I

THE COURT OF APPEAL'S DECISION VIOLATES BASIC FEDERAL LABOR POLICY BY HOLDING PETITIONER HAD NO SUBSTANTIVE RIGHT TO ARBITRATE HIS DISCHARGE GRIEVANCE.

By its initial holding that the new provisions of the 1979-82 Agreement were "unavailing" to Petitioner, (App. "A", p. 8), the Court of Appeal reasoned that because the 1976-79 Agreement only permitted the arbitration of discharges for cause under Paragraph 68 which in turn prohibited removal of employees from the Industry Experience Roster without cause, and because the new 1979-1982 agreement omitted the Roster provisions and Article 68,

> "The only *substantive* right an employee had to be discharged for *cause* was deleted from the 1979-1982 Agreement totally." (C.T. 12) (App. "A", p. 10).

This conclusion flew in the face of the change in the 1979-82 Agreement which inserted the language "(including discharges for cause)" into Article 7 of the grievance procedure provisions. The Court of Appeal, noting further that "disputes arising under Paragraph 68 covering the discharge for cause of an employee subject to Paragraph 68 . . ." remained in the new contract, brushed aside the new language "(including discharges for cause)" as "surplusage" and should not be entitled to any "significance". Said conclusion is completely at odds with federal labor policy in several respects. (1) It clashes with the "presumption of arbitrability" which was one of the key

holdings of the *Steelworkers Trilogy*[7]. (2) It ignores judicial admissions by defendants before the Superior Court. (3) It is based on a completely contorted interpretation of the contract.

A. The Decision Ignores The "Presumption Of Arbitrability".

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) is that part of the *Trilogy* which establishes the concept of "substantive arbitrability." If Petitioner's discharge rights were governed by a collective bargaining agreement, manifestly he had no right to bring an action under state law for wrongful discharge. His rights are exclusively governed by federal labor law. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985). Federal labor law applies even though this suit was brought in state court. *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962). The principal question here, however, is whether or not, as a matter of substantive arbitrability, Petitioner's discharge grievance would have been resolved under the terms of a collective bargaining agreement in the course of the grievance procedure leading to final and binding arbitration. The Court of Appeal interpreted the agreements to conclude Petitioner's arbitration rights were unavailing, notwithstanding the addition of "including discharge for cause" in the general subject of grievance procedures in Article 7. The reviewing court totally ignored the force of the contract parties' radical change to the Agreement. *Warrior & Gulf Navigation Co., supra,* holds that, where a contract contains an arbitration clause, the question of whether there is coverage for the

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[7] *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enterprise Car & Wheel Corp.*, 367 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

holding of arbitration raises a "*presumption of arbitrability*" in that:

> "... [a]n order to arbitrate the particular grievance may not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an arbitration that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*" (Emphasis ours, 363 U.S. at 582-583).

The concept has been echoed in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. ____, 106 S.Ct. 1415 (1986) and *Gateway Coal v. United Mine Workers*, 414 U.S. 368, 377-78 (1974). Accordingly, the Court of Appeal manifestly ignored the *Steelworkers Trilogy* in holding that arbitration would have been "unavailing". Had WBI resisted going to arbitration because the contract provided for no discharge arbitration, a court would certainly have issued an order to arbitrate, particularly where the parties to the contract had just inserted an unrestricted provision "including discharges for cause", and without any limitation based on removals from the Roster, into the grievance procedure and arbitration provision. Although Lowe could well conclude Penman had no right to have his discharge arbitrated earlier, the addition of "including discharges for cause" into the 1979-82 Agreement radically changed that posture.

B. The Court Of Appeal Also Ignored The Superior Court's Holding Based On Judicial Admissions That Petitioner's Discharge Dispute Was Preempted By Federal Labor Policy Over State Causes Of Action.

The Court of Appeal ignored not only the *Steelworkers Trilogy's* "presumption of arbitrability", but also the judicial admissions of WBI and Respondent who, in defending the case both at the pleading stage and in the

summary proceedings, raised affirmative defenses that federal labor policy subjected Petitioner's discharge grievance to federal labor law, not state common law. This formed the basis of the Superior Court's decision and, in affirming that judgment, the Court of Appeal endorsed such holding. Finding at this stage that the discharge grievance was not subject to arbitration is error because otherwise the Superior Court should never have rejected Petitioner's state tort and contract claims found to be federally preempted.

C. The Court Of Appeal's Conclusion That Arbitration Was "Unavailing" To Petitioner Was An Unwarranted Contract Interpretation Under Any Theory.

Aside from the fact that "doubts are to be resolved in favor of coverage" (*Warrior & Gulf, supra*, 363 U.S. at 582-583), the Court of Appeal arrived at an absolutely unfounded interpretation of the 1979-82 Agreement under any legal theory. The Court noted that, while the parties had supposedly deleted any references to Article 68, including subsection (c)'s provision respecting discharge for cause by removing Roster employees (App. "A", p. 10), Article 7 had retained the language "disputes arising under paragraph 68 covering the discharge for cause of an employee subject to paragraph 68, . . ." *Ibid.* The Court then held:

> "While we cannot explain how or why this language was included when it clearly was now clearly irrelevant, the references in the 1979-82 agreement to 'Paragraph 68' and 'discharge for cause' should be interpreted as mere surplusage and should not be entitled to any significance." *Ibid.*

The quoted language in Article 7 appeared in the final complete contract which was not executed until July 1980. (See the signature page at C.T. 406). In arriving at this

conclusion the Court of Appeal completely overlooked the *Memorandum of Agreement* which was executed in December 1979, by the parties (C.T. 452-458). This document shows clearly that "[a]ny and all references to the Industry Experience Roster contained in the local agreement shall be deleted." (Paragraph 6 of C.T. 453). Article 68 was in fact omitted from the full agreement executed in July 1980. The only rational conclusion to be reached is that the parties *inadvertently failed to delete* the Section 68 references in Article 7 when they drafted the final memorialization of their understandings! Certainly, the Court of Appeal should not have so cavalierly discarded the language "including discharges for cause" so as to render arbitration "unavailing" without clearer evidence of intent to remove any "doubts" that Petitioner's discharge grievance was covered.

D. The Court Of Appeal's Conclusion Conflicts With This Court's Decisions.

The above furnishes an ample basis to grant review of the conclusion which failed to adhere to well-established federal policy respecting substantive arbitrability. The result places Petitioner in a trap without any escape. First, Petitioner found his route to a state remedy under wrongful discharge principles cut off by virtue of the assertion of the federal preemption defense.[8] Then the Court of Appeal's holding any arbitrable relief was in any event "unavailing" closes the door to any federal remedy through arbitration and leaves him with no remedy!

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[8]Although Petitioner contended before the Superior Court that he was not covered during the hiatus period which arguably left him at that time free to argue coverage of state wrongful discharge law, this conclusion clearly had no merit if the new agreement went back retroactively to August 1, 1979, to cover his August 31, 1979 discharge. *Cf. Steelworkers v. Bell Foundry Co.*, 626 F.2d 139 (9th Cir. 1980).

For the above stated reasons, it is clear that the Court of Appeal "decided a Federal question in a way in conflict with applicable decisions of this Court." See *Rule* 17.1(c). Accordingly, the decision of the Court of Appeal of California mandates a decision by this Court to harmonize federal labor policy.

II

THE COURT OF APPEAL'S HOLDING THAT RESPONDENT AT THE MOST IS GUILTY OF SIMPLE NEGLIGENCE, NOT OF BAD FAITH, CONFLICTS WITH *VACA v. SIPES*, 386 U.S. 171 (1967), BECAUSE IT IGNORES DOCUMENTARY PROOF OF RESPONDENT'S BAD FAITH AND CONSPIRACY WITH WBI.

Having established Petitioner had a right to have an arbitrator determine his discharge grievance, Petitioner is relieved from the usual requirement to exhaust his contractual remedies under *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965). This is based on *Vaca v. Sipes,* 386 U.S. 171 (1967) which permits actions under Section 301 of LMRA where the union has breached its duty of fair representation. At the time of the breach, Petitioner's attorney, Lowe, was searching for a rationale to present to the arbitrator that Petitioner was a wrongful discharge victim. He was reluctant to take the matter up because he felt under the 1976-79 Agreement that Petitioner's discharge grievance was not then arbitrable in that he had not been removed from the Roster. Moreover, the parties had not followed the Roster procedure in over one year. Lowe disclosed his dilemma to St. Johns and asked St. Johns to clarify the situation for him by sending a copy of the new 1979-82 Agreement which was then in the process of being negotiated and about to be executed. Not only did St. Johns fail to send Lowe a copy of the new

agreement which he had helped to negotiate, but also he made the following statement that clearly dissuaded Lowe from going to arbitration:

> "As far as I can see there is no substantial change in the Charles Penman situation with regard to the arbitration between articles in the contract you have and the new one." (C.T. 448)

Vaca has defined a violation of fair representation as occurring when a union's "conduct toward a member is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. Since then the Court has further defined the duty as "intentional, severe, and unrelated to a legitimate union objective" (*Street Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, at 301 (1971)) and has further held that the "burden of demonstrating breach of duty by the Union . . . involves more than demonstrating errors in judgment." (*Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-71 (1976)).

The Court of Appeal acknowledged that "St. Johns' interpretation was misleading." (App. "A", p. 16) but characterized the conduct as no more than "simple negligence" (App. "A", pp. 14, 16). This conclusion undermines the holding in *Vaca v. Sipes*. It ignores the evidence Petitioner produced by discovery. Gary's Memorandum to Ballance to the effect that St. Johns was "supporting us" and that he would have to go through the "motions" of filing a grievance in itself is evidence of a diabolical conspiracy between Respondent and WBI to derail Penman's grievance. The complicity is further demonstrated by the shocking revelation that during a document production, copies of correspondence between Respondent, and Petitioner, and his attorney Lowe, were produced from WBI's own records. All of this explains other conduct on St. Johns' part, who, while he was "going through the motions" of arranging for an arbitration date and

appointment of an arbitrator with WBI, was also informing Lowe that Petitioner's employment was only on a "week to week" rather than a permanent basis. No contract language remotely supports St. Johns' assertion. Thus, Respondent's misleading of Lowe is surrounded by the most compelling mass of evidence to indicate that St. Johns intentionally meant to mislead Lowe into avoiding arbitration when to do so in the above circumstances would be fatal to Petitioner's case. And the Court of Appeal totally ignored such evidence. Respondent has never denied St. Johns' conduct. Such intentional misrepresentation is easily within the purview of "bad faith" as defined in *Vaca*. This is the very kind of misconduct branded as illegal by *Vaca* and the decision should be reviewed because under *Rule* 17.1(c) it is again in "conflict with applicable decisions of this Court".

III

EVEN IF RESPONDENT'S CONDUCT WAS NOT AN INTENTIONAL ACT, IT STILL VIOLATED VACA BECAUSE IT AMOUNTED TO MORE THAN SIMPLE NEGLIGENCE.

Even assuming that proffered evidence of bad faith on Respondent's part does not disclose "intentional" fraud or other intentional type of misconduct toward Petitioner, then the nature of the misrepresentation to Lowe raises a question as to whether or not the reckless nature of the representation compels the application of *Vaca* or whether or not the conduct is not actionable simply because it did not amount to actual intent on Respondent's part to injure Petitioner. Whether or not Respondent's conduct is actionable in these circumstances depends on which of two conflicting lines of decisions should be followed. The Seventh Circuit has consistently held that an employee bears a substantial burden of showing that a union delib-

erately and unjustifiably refused to represent him. To be condemned by *Vaca* as "intentional misconduct" requires substantial evidence of fraud, deceitful action or dishonest conduct by the union." See *Swatts v. Steelworkers*, 808 F.2d 1221 (7th Cir. 1986); *Dober v. Roadway Express*, 707 F.2d 292 (7th Cir. 1983); *Superczynski v. P.T.O. Services, Inc.*, 706 F.2d 200, 202 (7th Cir. 1983); and *Canon v. Consolidated Freightways*, 524 F.2d 290, 293 (7th Cir. 1975). See also *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir. 1986); *Hoffman v. Lonza*, 658 F.2d 519, 520 (7th Cir. 1981). On the other hand, the Ninth Circuit has held that a union violates its duty of fair representation depending on whether or not its error in handling a grievance "involved a judgment." If the union has committed a "ministerial act" which does not require the exercise of judgment and there is no rational or proper basis for the conduct, there is arbitrary conduct sufficient to warrant a finding of a breach of duty of fair representation where it will prejudice a strong interest of the employee. *Zuniga v. United Can Co.*, 812 F.2d 443, 451 (9th Cir 1987); *Galindo v. Stoody Co.*, 793 F.2d 1502, 1514 (9th Cir. 1986). Thus the conduct need not be "intentional" or even based on a "hostile motive" to breach such duty as where the union causes an employee to reject an offer of settlement she would otherwise have accepted. *Robesky v. Qantas Empire Airlines, Ltd.*, 573 F.2d 1082 (9th Cir. 1978). Unintentional acts are "arbitrary" in breach of *Vaca*, if they (1) "reflect reckless disregard for the rights of the individual employee", and (2) severely prejudice the employee, and (3) the policies underlying the duties of fair representation would not be served by "shielding the Union from liability in the particular case." *Robesky*, at 573 F.2d at 1090. *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983) later held that, even if there was only negligence involved, the union should be responsible for a total failure to act that was

"unexplained and unexcused." The matter of an employment discharge where the "individual interest at stake is large" and the union's failure to act has extinguished the employee's right to the claim will amount to a *Vaca* violation, even though the acts were not intentional but only negligent. The Ninth Circuit is eminently correct.

Thus, if the facts presented above do not evidence intentional misconduct but only negligent misconduct, there is a conflict between circuits as to which law should be followed. The Court of Appeal's decision appears to follow the Seventh Circuit by judging the conduct as no more than simple negligence. Had the Ninth Circuit rule stated above been correctly applied, the result would clearly have been in favor of Petitioner. This conflict between at least two circuits[9] demonstrates significant and recurring problems in establishing a uniform labor policy respecting to what extent unintentional conduct by

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[9]In other circuits, a "perfunctory handling" of a grievance may subject a union to liability even though no clear intent was demonstrated. *Wyatt v. Interstate & Ocean Transportation Co.*, 623 F.2d 888, 891 (4th Cir. 1980); *Ethier v. United States Postal Service*, 590 F.2d 733 (8th Cir., 1979) *cert. denied*, 444 U.S. 826 (1979); *Foust v. Electrical Workers*, 572 F.2d 710, 714-716 (10th Cir. 1978), *reversed on other grounds*, 442 U.S. 42 (1979); *Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975) modified 649 F.2d 1207 (1981), *cert. denied*, 464 U.S. 982 (1983). Moreover while the First, Eighth and Eleventh Circuits hold that simple negligence is not enough to establish a breach, they have not defined the minimum level of actionable conduct necessary to establish a *Vaca* violation. *Poole v. Budd Co.*, 706 F.2d 181 (6th Cir. 1983); See also *Ruzicka v. General Motors Corp., supra.* Moreover, a district court in the Fourth Circuit has held that the term "arbitrary" used in *Vaca* entails a degree of conscious malfeasence or dereliction and may be based on indifference and without an honest mistake or carelessness. *Lewis v. Postal Workers*, 561 F.Supp, 1141 (W.D. Va. 1983). This conflict in the circuits received comment in *Camacho, supra*, 786 F.2d 246 which predicted this Court would eventually resolve "these recurring differences".

a union may in the circumstances amount to "arbitrary, discriminatory or bad faith" conduct under *Vaca*. The conflict represents an "important question of federal law which has not been, but should be, settled by this Court." *Rule* 17.1(c).

IV

THE DECISION BELOW ALSO RAISES A SIGNIFICANT ISSUE AS TO WHETHER OR NOT PETITIONER IS ENTITLED TO AN ALTERNATIVE THEORY OF RECOVERY BASED ON EQUITABLE ESTOPPEL.

Assuming that the Court of Appeal was correct that Respondent's conduct did not warrant a finding of a breach of duty of fair representation, a question still remains whether or not Petitioner is entitled to maintain an action based on equitable estoppel. The Ninth Circuit has held that a victim of material misrepresentations on the part of his union may sue as an alternate form of recovery if he shows (1) the union was aware of the true facts, (2) the union intended its representations to be acted on or acted such that the plaintiff had a right to believe it so intended, (3) the plaintiff was ignorant of the true facts, and (4) the plaintiff relied on the union's representations to him to his detriment. *Acri v. International Association of Machinists and Aerospace Workers,* 781 F.2d 1393 (9th Cir. 1986), *cert. denied,* ___ U.S. ___, 107 S.Ct. 783 (1987); *Hass v. Darigold Dairy Products Co.,* 751 F.2d 1096, 1099-1100 (9th Cir. 1985); *Bob's Big Boy Family Restaurants v. NLRB*, 525 F.2d 850, 854 (9th Cir. 1980). The doctrine has also been followed in the Sixth Circuit. *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210, 1217 (6th Cir. 1987). To date there have been no cases decided in this Court as to whether or not there is an alternative theory of recovery available for the victim of a union's material misrepresentations. All of the ele-

ments are established here in that St. Johns made a material misrepresentation to Penman's attorney, he must have intended his representations to be acted upon, Petitioner was ignorant of the true facts, and relied on the representation to his detriment.

In the interest of resolving another potentially significant and recurring problem which affects federal labor policy, the Court should, if necessary, grant certiorari to determine whether or not this alternate ground of recovery is available. The Court of Appeal recognized the doctrine but, without any analysis, merely concluded that "the elements thereof do not exist on this record." (App. "A", p. 16).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal. Petitioner respectfully contends that the issues of Respondent's bad faith should have been tried before the Superior Court and not summarily dismissed.

Respectfully submitted,

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November 9, 1987

APPENDIX A

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

CHARLES PENMAN,
Plaintiff and Appellant,
v.
WARNER BROTHERS, INC., and
INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES AND MOVING PICTURE
MACHINE OPERATORS OF THE UNITED STATES
AND CANADA AND THE PUBLICISTS, LOCAL 818, et al.,
Defendants and Respondents.

2d Civil No. B016802
(Super. Ct. No. C 348 833)

Filed: May 28, 1987
Clay Robbins, Jr. Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Norman R. Dowds, Judge. Affirmed.

Mathews and Evans, William D. Evans for Plaintiff and Appellant.

Geffner & Satzman, Leo Geffner and Jeffrey Paule for Defendants and Respondents.

Plaintiff and appellant Charles Penman (Penman) appeals a summary judgment granted in favor of defendant and respondent International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators

of the United States and Canada and the Publicists, Local 818 (Union).[1]

SUMMARY STATEMENT

Penman was fired by Warner Bros., Inc. (WBI)[2] and sought to have his Union file a grievance because he felt, inter alia, he had been wrongfully terminated and was a victim of racial discrimination. After the Union commenced the grievance procedure pursuant to the collective bargaining agreement with WBI, Penman decided to employ his own attorney.

Clarence Lowe (Lowe) took over for Penman and elicited the assistance of the Union's business agent, Mac St. Johns (St. Johns), in preparation of Penman's grievance. Lowe was of the impression that almost all union contracts negotiated around 1979 required just cause for termination. However, St. Johns informed Lowe the contract provided for week to week at will employment only.

Lowe communicated with St. Johns over several months, during which time Lowe received from St. Johns prior arbitration decisions covering this point. Lowe had a copy of the old contract and requested a copy of the newly negotiated contract, but did not receive one. However, St. Johns told Lowe there was no substantial change in Penman's situation with regard to arbitration between the provisions of the old and the new contract; grieving or arbitrating for cause would be covered under the old contract Article 7 language.

Failing to resolve the mixed signals in St. Johns' letter, Lowe and Penman decided not to take Penman's griev-

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[1]All matters set forth herein have come from the pleadings, including the motions for summary judgments and opposition.

[2]WBI is not a party to this appeal.

ance to arbitration and abandoned it. Instead, Penman filed suit against WBI and the Union for relief from violation of 42 U.S.C. section 1981, devolved from the Civil Rights Act of 1866; wrongful discharge; breach of implied covenant of good faith and fair dealing; and breach of duty of fair representation.

Following several years of discovery, WBI and the Union filed motions for summary judgments. Thereafter, Penman filed a second amended complaint, adding a cause of action against the Union for misrepresentation and concealment of facts causing Penman to forego any rights and duties he may have had to arbitrate his termination under the 1979-1982 agreement.

The trial court granted summary judgments as to both entities, ruling Lowe's decision not to proceed with arbitration was a conscious decision based upon an evaluation of the success of Penman's claim and was not based on Union representations or any delay in the receipt of the new contract. Penman appealed, contending essentially that a triable issue of fact remained as to what were the consequences of St. Johns' alleged concealment.

Because the Union did not breach its duty of fair representation to Penman, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Penman, an Hispanic and native of Costa Rica, worked at WBI from 1973 until his termination on August 31, 1979. During the final year of his employment, he worked as a junior publicist and was represented by the Union. The Union had negotiated collective bargaining agreements with WBI. His tenure of employment was governed by two such agreements: one agreement covering the period from 1976 to August 1, 1979 (the 1976-1979 agreement), and a new one executed in December 1979 (the

1979-1982 agreement) but retroactive to August 1, 1979. Article 7 of both agreements provided a grievance procedure for resolving disputes arising between the Union, its members and WBI and for binding arbitration.

Following his termination, Penman sought the assistance of the Union to protest his firing, and the Union took the necessary preliminary steps. Thereafter, Penman retained Lowe to represent him. On September 5, 1979, Lowe filed a grievance against WBI on behalf of Penman. On September 6, 1976, the Union, through St. Johns, also filed a grievance on Penman's behalf, and represented him at an October 11, 1979 meeting.

WBI refused to reinstate Penman. St. Johns so informed Lowe, and also advised Lowe that if Lowe and Penman decided to arbitrate, the Union would make the necessary arrangements. St. Johns also gave Penman permission to be represented at the arbitration by Lowe rather than by a Union attorney.

In preparation for the arbitration, Lowe and St. Johns communicated several times. St. Johns sent Lowe several prior arbitration decisions regarding similar terminations, and discussed with Lowe the theories Lowe was considering on Penman's behalf.

Lowe had a copy of the 1976-1979 agreement which contained a clause numbered 68 dealing with seniority and the maintenance of an industry-wide experience roster. A subparagraph (c) thereunder required a producer to show just cause to remove an employee from said roster. St. Johns informed Lowe the Industry Experience Roster was no longer in effect.

Thereafter, Lowe communicated to St. Johns his theory that if the just cause language of clause 68(c) were retained in the 1979-1982 agreement, notwithstanding the fact that the references to the Industry Experience Ros-

ter has been deleted, the 1979-1982 agreement would have to be construed as requiring just cause for removal of an employee.

St. Johns responded on December 18, 1979, that clause 68 had been eliminated in its entirety, and that "[g]rieving or arbitrating on persons 'fired for cause' comes under Article 7 of the old contract. [¶] It will be some weeks before we get a complete copy of the new contract but as far as I can see there is no substantial change in the Charles Penman situation with regards to the arbitration between articles in the contract you have and the new one." The 1979-1982 agreement was different in several respects, and Article 7 thereof added "(including discharge for cause)" to disputes subject to grievance procedures. Penman did not get a copy of the 1979-1982 agreement until discovery in the underlying case.

An arbitration hearing date was scheduled, but was postponed by Lowe, and never rescheduled. Lowe eventually decided against proceeding to arbitration after concluding it would be futile, and opted to sue instead.

On May 26, 1981, Penman filed a first amended complaint against WBI and the Union. The first five causes of action were against WBI. The sixth cause of action named only the Union and alleged the Union violated 42 U.S.C. section 1981 when it negotiated agreements which favored white members, and that the Union treated white members more favorably than persons like himself. The sixth cause of action also alleged the Union breached its duty to represent Penman fairly and without arbitrary and invidious discrimination.[3]

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[3]Penman does not argue the violation of his civil rights under 42 U.S.C. section 1981 on appeal.

Lowe died suddenly in February 1985, but Penman's lawsuit proceeded.

In July 1985, WBI and the Union filed motions for summary judgments, which motions were granted August 29, 1985.

In the interim, on August 28, 1985, Penman filed a second amended complaint, with the additional allegation that the Union breached its duty of fair representation when the Union failed to inform Lowe aned Penman about changes in the 1979-1982 agreement that would have prompted them to go forward with arbitration.

In granting the summary judgment motion as to WBI, the trial court found the 1979-1982 agreement governed Penman's termination and required arbitration, and as a consequence, Penman had failed to exhaust his contractual remedies. As to the Union, the trial court ruled: "There [was] no triable issue as to the material fact that the failure of [Penman] through his attorney [Lowe] to complete the grievance procedure provided by the collective bargaining agreement was a conscious decision based upon an evaluation of the chances of success of the claim and was not based on any matters stated by Union representatives or any delay in obtaining a copy of the 1979 collective bargaining agreement[,]" and thus the Union was "entitled to judgment as a matter of law."

Penman appealed.

CONTENTION

Penman contends material questions of fact existed as to whether the Union breached the duty of fair representation.

DISCUSSION

1. Summary judgment rules.

"Summary judgment is properly granted only if no material fact exists or where the record establishes as a matter of law that a cause of action asserted against a party cannot prevail. (*Avila* v. *Standard Oil Co.* (1985) 167 Cal.App.3d 441, 446 [213 Cal.Rptr. 314].) The affidavits and declarations of the moving party are strictly construed while those of the opposition are liberally construed. (*Gray* v. *Reeves* (1977) 76 Cal.App.3d 567, 573 [142 Cal.Rptr. 716].) [¶] ... [W]hen the sole ramaining question is one of law, it is the duty of the trial court to determine the issue of law. (*Coast-United Advertising, Inc.* v. *City of Long Beach* (1975) 51 Cal.App.3d 766, 769 [124 Cal.Rptr. 487].) [¶] .... [¶] Because the determination of the trial court is one of law based upon the papers submitted, the appellate court must make its own independent determination of their construction and effect. (*Larsen* v. *Johannes* (1970) 7 Cal.App.3d 491, 496 [86 Cal.Rptr. 744].) However, a motion for summary judgment is addressed to the sound discretion of the trial court, so that absent a clear showing of abuse, the judgment will not be disturbed on appeal. (*Leo F. Piazza Paving Co.* v. *Foundation Constructors, Inc.* (1981) 128 Cal.App.3d 583, 589 [177 Cal.Rptr. 268].) [¶] In reviewing a summary judgment, an appellate court is not confined to the sufficiency of the stated reasons. Instead, the validity of the ruling is reviewable, irrespective of the reasons stated. (*Durbin* v. *Fletcher* (1985) 165 Cal.App.3d 334, 341 [211 Cal.Rptr. 483].)" (*Taylor* v. *Fields* (1986) 178 Cal.App.3d 653, 659-660.)

These rules govern our review of this case.

2. 1979-1982 agreement controls.

a. New provisions unavailing to Penman.

The 1979-1982 agreement, executed in December 1979 was made retroactive to August 1, 1979. For purposes of this fact situation, it governed the termination of Penman on August 31, 1979.

While we do not represent we made careful and thorough analyses of the two agreements in their approximate respective 25 page entireties, we have compared certain key provisions for their limited applicability to the case before us. The 1976-1979 agreement did contain a *substantive* provision covering discharge for cause under clause 68 entitled "Seniority."[4] However, the provisions thereof applied only to those senior employees listed on the Industry Experience Roster who thereby enjoyed certain preferential treatment.

Once an employee made the list, said employee could be removed by a producer only with a showing of just cause. The employee was entitled to immediate notification, to

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[4]Clause 68 of the 1976-1979 agreement provided in four and one-half pages in pertinent part: "68. *Seniority* [¶] a) *Maintenance of Industry Experience Roster* — . . . , which will be maintained under this agreement, . . . [¶] . . .: [¶] *Industry Group 1* . . . [¶] *Industry Group 2* . . . : [¶] b) *Hiring, Layoff, and Rehire*— . . . [¶] . . . [¶] . . ., each qualified person listed in any one of such Industry Groups shall have preference of employment . . . [¶] . . . [¶] c) *Removal of Person from Producer's Industry Experience Roster* — A person may be removed by the Producer from its Industry Experience Roster for any of the following reasons: [¶] 1) Discharge by the Producer for cause. Producer will immediately notify employee and Local Union, and will reduce the cause for discharge into writing and mail or deliver . . . If such protest is made within such 10-day period, it shall immediately be submitted to the 1st Step of the grievance procedure in Article 7 . . . Three discharges for just cause shall subject the employee to automatic removal from Industry Experience Roster. [¶] . . . [¶] 8) Death. [¶] . . . [¶] f) *Absences* . . . "

have the cause for discharge reduced to writing, and to a copy of the writing by delivery or mail. Thereafter, the grievance *procedures* set forth in Article 7 governed.[5]

The parties herein conceded Penman was never on this roster and therefore not entitled to the special employment protections that were afforded, even assuming Penman could have made some showing of a vested right to be terminated under the 1976-1979 agreement.

Article 7 of both agreements was entitled, "Grievance Procedure." These articles set forth various steps to be followed, and provided for regular and expedited arbitration. Both Article 7's covered work-related disputes among persons/entities subject to the agreements.

Although clause 68 was eliminated in its entirety in the 1979-1982 agreement, the new Article 7 contained the additional parenthetical phrase "(including discharge for cause)." Step three of the new Article 7 *still* referred to the now nonexistent claims arising under the eliminated "Paragraph 68" involving disputes relating to failure to

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[5]Article 7 of the 1979-1982 agreement provided in relevant part as follows: "Article 7 *Grievance Procedure* [¶] . . . [¶] In the event of any dispute between the . . . Union or any [member] . . . and the Producer with regard to wage scales, hours of employment, working conditions (*including discharge for cause*) . . . , the procedure, . . . , shall be as follows: [¶] . . . [¶] *Step Three* — If the parties do not agree that the conciliation committee's recommendation will be final and binding on them or if the parties fail to resolve the grievance, then the parties may proceed to the expedited arbitration or the regular arbitration as provided below: [¶] The aggrieved party may elect to proceed to expedited arbitration . . . if no agreement has been reached by the parties but only in cases wherein the claim arises under Paragraph 68 involving disputes relating to the failure to follow studio seniority or industry seniority, and disputes arising under Paragraph 68 covering the *discharge for cause* of an employee subject to Paragraph 68, of the applicable West Coast Studio Local Agreements, . . ." (Italics added.)

follow seniority rights and to "*disputes arising under Paragraph 68 covering the discharge for cause of an employee subject to Paragraph 68, . . .*" (Italics added.)

While we cannot explain how or why this language was included when it was now clearly irrelevant, the references in the 1979-1982 agreement to "Paragraph 68" and "discharge for cause" should be interpreted as mere surplusage and should not be entitled to any significance. (*Beverly Hills Oil Co.* v. *Beverly Hills Unified Sch. Dist.* (1968) 264 Cal.App.2d 603, 610.) The only *substantive right* an employee had to be discharged for *cause* was deleted from the 1979-1982 agreement totally.[6]

Lowe apparently tried out on St. Johns one of his sophisticated legal theories as to how best he could represent Penman. Lowe expounded that if the language of clause 68(c) were being retained in the 1979-1982 agreement even though the references to the Industry Experience Roster were being deleted, then said agreement must be construed as requiring just cause for termination.

St. Johns responded in a December 18, 1979 letter that the entire "Article 68" had been eliminated and that it would be "some weeks" before he obtained a copy of the new agreement. He nonetheless proferred his opinion that there would be no substantial change in arbitrating Penman's dispute under the new agreement, and that "[g]rieving or arbitrating on persons 'fired for cause' comes under Article 7 of the old contract[,]" without further explanation.

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[6]Likewise, in light of the deletion of clause 68, the gratuitous retention of the phrase, "discharge for cause" in clause 63 of the 1979-1982 agreement dealing with "Continuous Employment," does not provide a substantive right to Penman.

Lowe was in possession of the 1976-1979 agreement and certain arbitration decisions dealing with this issue. Clearly, clause 68(c) was very limited and specific. Lowe knew St. Johns did not have a copy of the 1979-1982 agreement when he wrote the December 18 letter, giving Lowe his lay opinion in comparing the two agreements. But even in possession of St. Johns' inherently contradictory letter, Lowe did not follow up with further pertinent inquiries as to what St. Johns meant, i.e., what was the significance of the reference to "discharge for cause" in the 1979-1982 agreement, or in what context did it appear, since clause 68(c) had been eliminated. However, without resolving the conflict, and without waiting the several weeks necessary to obtain a copy of the 1979-1982 agreement, and thereby having the opportunity to examine it, Lowe apparently evaluated what information was before him and concluded arbitration would be futile. He opted to file Penman's lawsuit instead, based on the theory that he had somehow been misled by St. Johns' telling him there was no change in the nonarbitrable at will termination of Penman, and yet suggesting the new contract required just cause for firing.

Lowe was the attorney in charge, and in that role, had the right and the responsibility to make the final decision whether to arbitrate Penman's case. It was his job to evaluate critically the information he had and to obtain more if necessary. Penman, however, now seeks to blame the Union for Lowe's crucial decision *not* to arbitrate. The trial court's determination that Lowe's decision was a "conscious decision" appears appropriate.

3. No breach of the Union's duty of fair representation owed to Penman.

a. Penman's contention.

Penman contends Lowe abandoned arbitration, confidently relying on St. Johns' assurances Penman's dispute was not arbitrable, even though St. Johns' letter was inherently contradictory. Instead, Lowe sought recovery for wrongful discharge in the state court premised on the authorities of *Tameny* v. *Atlantic Richfield Co.* (1980) 27 Cal.3d 167, *Cleary* v. *American Airlines, Inc.* (1980) 111 Cal.App.3d 443, and *Pugh* v. *See's Candies, Inc.* (1981) 116 Cal.App.3d 311. He erroneously argues such a course would have been successful had his discharge in fact not been governed by a collective bargaining agreement, but because it was, his claims were preempted by federal law, citing to *Buscemi* v. *McDonnell Douglas Corp.* (9th Cir. 1984) 736 F.2d 1348.

Penman's argument continues to the effect that a question remains as to whether Lowe's failure to take the case to arbitration was based on a "conscious decision" as found by the trial court, or was caused by St. John's false and fraudulently misleading advice.

However, Penman's insistence that the Union breached its duty of fair representation to him through St. Johns' misleading interpretation of the new agreement is without justification. Simple negligence or errors in judgment on the part of a union are insufficient to support a breach of a union's duty of fair representation.

b. Standard of care.

While a state court may provide a forum for claim of breach of duty of fair representation against a union, federal law governs. (*Sarro* v. *Retail Store Employees Union* (1984) 155 Cal.App.3d 206, 212.)

In *Vaca* v. *Sipes* (1967) 386 U.S. 171 at pages 185-188 [17 L.Ed.2d 842], the United States Supreme Court recognized an employee can bring suit against a union for wrongfully refusing to process a grievance. However, *Johnson* v. *United States Postal Service* (9th Cir. 1985) 756 F.2d 1461, 1465, citing *Vaca* emphasized a union may exercise wide discretion in acting in what it perceives as a member's best interest. Therein, the Ninth Circuit stressed the importance of union discretion by narrowly construing the doctrine of unfair representation. *(Ibid.)* Thus, a heavy burden is placed upon union members attempting to show such a breach of a union's duty in a grievance proceeding. (*Sarro* v. *Retail Store Employees Union, supra,* at p. 213; *Logan* v. *Southern Cal. Rapid Transit Dist.* (1982) 136 Cal.App.3d 116, 129.)

Only when a union's conduct toward a member is arbitrary, discriminatory or in bad faith, is the duty of fair representation breached. (*Vaca* v. *Sipes, supra,* 386 U.S. at p. 190.) While an employee has no absolute right to have a grievance taken to arbitration, a union may not ignore a meritorious grievance nor process it perfunctorily. (*Id.,* at p. 191.) On the other hand, the grievance process need not be error free. To constitute a breach of duty of fair representation, more than a mere error of judgment must occur. (*Hines* v. *Anchor Motor Freight, Inc.* (1976) 424 U.S. 554, 570-571 [47 L.Ed.2d 231].)

As a result of these standards, courts will not interfere with union decisions concerning employee grievances unless it can be shown a union recklessly disregarded the rights of the employee. (*Castelli* v. *Douglas Aircraft Co.* (9th Cir. 1985) 752 F.2d 1480, 1482.) To constitute arbitrary conduct, omissions must be unfair, egregious and unrelated to legitimate union interests. (*Johnson* v. *United States Postal Service, supra,* 756 F.2d at p. 1465.)

In considering whether a union breached its duty of fair representation, case law holds " 'simple negligence,' " such as violating the tort standard of due care, or errors in the union's judgment, do not constitute a breach of its duty. (*Dutrisac* v. *Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, 1272; *Dirring* v. *Lombard Bros., Inc.* (D. Mass. 1984) 619 F.Supp. 911, 917, affd. without opn. (1st Cir. 1986) 787 F.2d 578; *Johnson* v. *United States Postal Service, supra,* at p. 1465.)

"Most of the decisions finding 'simple negligence' insufficient to establish a breach of the duty involve alleged errors in the union's evaluation of the merits of a grievance, *see, e.g., Singer* v. *Flying Tiger Line, Inc.,* 652 F.2d 1349, 1355 (9th Cir.1981), *in its interpretation of the collective bargaining agreement, see, e.g., Ethier* v. *United States Postal Service,* 590 F.2d 733, 736 (8th Cir.), *cert. denied,* 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979), or in its decisions concerning presentation of the grievance at the arbitration hearing, *see e.g., Ness* v. *Safeway Stores, Inc.,* 598 F.2d 558, 560 (9th Cir.1979); *Price* v. *Southern Pacific Transportation Co.,* 586 F.2d 750, 751, 754 (9th Cir.1978)." (*Dutrisac* v. *Caterpillar Tractor Co., supra,* 749 F.2d at p. 1273, italics added.)

In *Ethier* v. *United States Postal Service* (8th Cir. 1979) 590 F.2d 733, 734-735, a discharged postal employee brought an action against his union alleging it had breached its duty of fair representation in processing his grievance. Affirming the granting of a summary judgment, the court held a *misconstruing of the language in a collective bargaining agreement by a union steward was not a breach of the duty of fair representation.* (*Id.,* at p. 736.)

In *Dutrisac* v. *Caterpillar Tractor Co., supra,* 749 F.2d at page 1274, footnote 2, in deciding if a union's failure to file a grievance timely was a breach of the duty of fair representation, the court considered whether the union's

negligence completely cut off the employee's claim. *Dutrisac* distinguished *Stephens* v. *Postmaster General* (9th Cir. 1980) 623 F.2d 594, noting in *Stephens,* the union's negligence did not completely cut off the employee's claim because the employee had notice of the filing deadline but chose to ignore it, relying instead on erroneous advice from his union steward. (*Dutrisac* v. *Caterpillar Tractor Co., supra,* at p. 1274, fn.2; *Stephens* v. *Postmaster General, supra,* at pp. 595-596.)

c. Applicability here.

This case does *not* involve a union wrongfully refusing to process a grievance. On the contrary, even though St. Johns apparently consistently believed the collective bargaining agreements provided for *at will* employment and so advised Lowe, he stood ready to take Penman's grievance all the way to arbitration. When Penman requested private counsel be allowed to represent him at arbitration instead of a Union attorney, St. Johns acquiesced in that request, even though he was not required to do so. (*Castelli* v. *Douglas Aircraft Co., supra,* 752 F.2d at pp. 1483-1484.)

St. Johns continued to cooperate with Lowe in the processing of Penman's grievance to arbitration by suggesting arbitration dates, but Lowe cancelled the scheduled arbitration. St. Johns also forwarded to Lowe several prior arbitration opinions. Lowe acknowledged reviewing decisions dealing with the construction of the 1976-1979 agreement and the rulings that held there was no requirement for just cause in terminating any employee under the agreement. In one such decision, an arbitrator refused to imply a just cause requirement.

This case, rather, is similar to one involving the simple negligence of a union steward in misinterpreting a collective bargaining agreement by misconstruing the language

therein. (See *Ethier* v. *United States Postal Service, supra,* 590 F.2d at p. 736.) There was no showing here of intentional deception, arbitrariness, discrimination, bad faith, or reckless disregard toward Penman by St. Johns.

At most, St. Johns was negligent. While St. Johns did not have a copy of the final version of the 1979-1982 agreement when he wrote the December 18 letter to Lowe, he was an experienced business agent and in fact, signed the agreement on behalf of the Union. However, as pointed out *ante,* had St. Johns had a copy of the 1979-1982 agreement, he may have been as confused as we were by its provisions. He may have concluded the "discharge for cause" language in Article 7 was inserted by mistake because it did not relate to any other language in the 1979-1982 agreement and so informed Lowe. From this record, there is no reason to believe St. Johns would not have forwarded a copy to Lowe for Lowe to scrutinize in a lawyer-like manner on behalf of his client as soon as one was available. While St. Johns' interpretation was misleading, there was no showing of fraudulent concealment, or of unfair, dishonest or egregious conduct by him. Therefore, there was no breach of duty of fair representation.

Further, these facts do not support any recovery by Penman against the Union pursuant to the doctrine of equitable estoppel. Even if we were to conclude such an alternative theory were available to Penman pursuant to *Hass* v. *Darigold Dairy Products Co.* (9th Cir. 1985) 751 F.2d 1096, 1099-1100, the elements thereof do not exist on this record.

CONCLUSION

Penman's case was premised on the assumption, had St. Johns *not* made *misrepresentations* with respect to the provisions of the 1979-1982 agreement that allegedly

drastically modified the terms and conditions of Penman's employment so as to make his grievance arbitrable, the matter would have gone to arbitration and Penman would have prevailed in his action against WBI. The facts set forth in this record do not support his speculative assumption.

However, he failed to exhaust the contractual remedies required by the agreement, which constituted a condition precedent to suing WBI, even though arbitration would have been unavailing. As an after thought, he sought to shift the blame to the Union, and to excuse his noncompliance with a contention the Union breached its duty of fair representation to him. He further sought to recover damages against the Union for his failure to go to arbitration. Penman had *no case* in the beginning, and it did *not* get any stronger as it progressed.

DISPOSITION

The judgment is affirmed. Each party to bear respective costs on appeal.

KLEIN, P.J.

We concur:

LUI, J.

DANIELSON, J.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 3424 Wilshire Boulevard, Suite 1000, Los Angeles, CA 90010.

On July 7, 1986, I served the foregoing document described as Petition for Review, on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, CA addressed as follows:

The Honorable Norman R. Dowds
Superior Court of California
County of Los Angeles
111 North Hill St.
Los Angeles, CA 90012

Court of Appeal
State of California
Second Appellate Dist.
Division Three
3580 Wilshire Blvd., Room 301
Los Angeles, CA 90010

Leo Geffner, Esq.
Geffner, Goldstein & Paule
3055 Wilshire Blvd., Suite 900
Los Angeles, CA 90010

(BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ILLEGIBLE]

Signature

APPENDIX B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 59

C 348 833

CHARLES PENMAN

VS.

WARNER BROS., INC., et al.

Date: August 29, 1985

Honorable Norman R. Dowds, Judge.

RULING ON SUBMITTED MATTERS OF 8-28-85

MOTION BY UNION FOR SUMMARY JUDGMENT AND/OR SUMMARY ADJUDICATION OF ISSUES

MOTION BY WARNER BROS. FOR SUMMARY ADJUDICATION OF ISSUES

In these matters heretofore argued and submitted, the court now rules as follows:

Motion of defendant Warner Bros., Inc. for summary adjudication of issues is granted. There is no triable issue as to the material fact that the 1979 collective bargaining agreement became effective as of August 1, 1979 and governed the question of plaintiff's discharge and that plaintiff, through his own legal counsel, elected not to exhaust the contractual remedies, including arbitration, provided thereby. Counsel for Warner Bros. shall prepare a proposed form of order.

Motion of defendant Publicists Guild, Local 818, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada for summary judgment is granted. Its motion for attorneys' fees is denied. There is no triable issue as to the material fact that the failure of plaintiff through his attorney to complete the grievance procedure provided by the collective bargaining agreement was a conscious decision based upon an evaluation of the chances of success of the claim and was not based on any matters stated by union representatives or any delay in obtaining a copy of the 1979 collective bargaining agreement. Counsel for the Union shall prepare a proposed form of judgment. (p. 648)

A copy of this minute order is sent via U. S. Mail to:

MATHEWS & EVANS
William D. Evans
3435 Wilshire Blvd.
Suite 2130
Los Angeles, CA 90010

GEFFNER & SATZMAN
Leo Geffner
3055 Wilshire Blvd.
Suite 900
Los Angeles, CA 90010

DRETZIN & KAUFF
James S. Bryan
1875 Century Park East
Suite 2190
Los Angeles, CA 90067

(p. 649)

APPENDIX C

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 3, No. B016802
S001491

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PENMAN

v.

WARNER BROTHERS, INC. et al.

Appellant's petition for review DENIED.

PANELLI, Acting Chief Justice

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 10, 1987, I served the within Petition for Writ of Certiorari in re: "Charles Penman vs. International Alliance of Theatrical Stage Employees and Moving Picture" in the United States Supreme Court, October Term 1987, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Leo Geffner
Geffner, Goldstein & Paule
3055 Wilshire Boulevard, Suite 900
Los Angeles, California 90010

Terri A. Tucker
6363 Wilshire Boulevard, Suite 228
Los Angeles, California 90048

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 10, 1987, at Los Angeles, California

J. GORDON HOOPER

No. 87-794

In the SUPREME COURT of the United States

OCTOBER TERM, 1987

CHARLES PENMAN,

Petitioner,

vs.

PUBLICISTS GUILD, LOCAL 818, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION THREE

RESPONDENT'S BRIEF IN OPPOSITION

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OCTOBER TERM, 1987

CHARLES PENMAN,

Petitioner,

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PUBLICISTS GUILD, LOCAL 818, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

RESPONDENT'S BRIEF IN OPPOSITION

PARTIES

Petitioner has named Respondent in such a way as to suggest that both the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada ("IATSE") and its affiliate local, Publicists Guild, Local 818 are parties hereto. The International has never been a party to this lawsuit, and the Respondent is more properly referred to by the name shown on the caption of this Brief in Opposition to Petition for Certiorari.

COUNTERSTATEMENT OF FACTS

The undisputed record in this case shows the following. Petitioner Charles Penman ("Petitioner" or "Penman") was employed by Warner Brothers, Inc. ("WBI") from 1973 until August 31, 1979, when his employment with WBI was terminated. From August 1, 1978 until August 31, 1979, Penman worked as a Junior Publicist in WBI's Publicity Department. At all times during his tenure as a Junior Publicist, the terms and conditions of Penman's employment were governed by a Collective Bargaining Agreement betwen WBI and Publicists Guild, Local 818 ("the Union"). Until August 1, 1979, the applicable Agreement was the 1976-79 contract; on August 1, 1979, a successor Agreement, executed in December 1979 and retroactively effective, became the governing document.

In both the 1976 and 1979 contracts between WBI and the Union, Article 7 contained a formal and binding grievance and arbitration procedure for resolving "any dispute between the Local Union or any of the persons subject to [the] Agreement and the Producer with regard to wage scales, hours of employment or working conditions or with regard to the interpretation of this Agreement concerning such provisions." Although the 1976 Agreement contained specific language protecting employees on the "Industry Roster" from discharge without cause, both contracts contained references to "discharge for cause" outside of the Industry Roster provisions.

Following his termination, Penman retained the services of a private attorney, Clarence Lowe, to

represent him with respect to his termination. Penman asked the Union for permission to have Lowe represent him in connection with his discharge grievance and arbitration. The Union agreed, but remained available to assist Lowe when asked. At no time did the Union ever refuse to take Petitioner's grievance to arbitration.

On September 5, 1979, Penman, with the assistance of Lowe, filed a grievance against WBI with respect to Penman's termination. On September 6, 1979, the Union, through Business Agent Mac St. Johns, also filed a grievance against WBI on behalf of Petitioner. The grievance filed by the Union requested that Penman be reinstated to his position and that he be paid back salary from the date of his termination to the date of reinstatement.

The filing of the grievances by and on behalf of Petitioner led to a "second step" grievance meeting on October 11, 1979. Union Business Agent St. Johns represented Appellant at this meeting. Despite St. Johns' efforts at this meeting, WBI refused to reinstate Penman.

On October 12, 1979, the Union notified Penman's attorney, Lowe, of the results of the second step grievance meeting. St. Johns also advised Lowe that if he and Penman wanted to proceed to arbitration, the Union would notify WBI and make the necessary arrangements for the arbitration.

On October 16, 1979, the Union notified WBI that Penman's grievance would be proceeding to arbitration and that Penman would henceforth be represented by Clarence Lowe. Following this letter, an arbitration hearing was scheduled for November 8, 1979. On October 16, 1979, however, Lowe wrote to St. Johns

and requested that the arbitration hearing be continued because Lowe had a prior commitment. On November 13, 1979, and again on February 28, 1980, St. Johns wrote to Lowe and suggested several other dates for the arbitration hearing. Lowe did not respond to these letters, and as a result, the arbitration was never rescheduled.

Lowe eventually decided that Penman's grievance was unmeritorious and that proceeding to arbitration would be "futile". Lowe therefore made a decision to abandon the grievance. Lowe's decision was based upon his review of the contract, various arbitration decisions which had been provided to him by the Union, and the merits of Petitioner's case.

COUNTERSTATEMENT OF THE CASE

Penman began his case with a variety of claims against WBI and the Union, including state law claims for wrongful discharge, federal claims for racial discrimination and breach of the duty of fair representation, and later, for equitable estoppel. WBI moved for summary adjudication of the issues, and the Union moved for summary judgment, both on the basis of the First Amended Complaint. Both were successful.[1] (See Penman's Petition for Writ of Certiorari, hereinafter referred to as "Petition," Appendix B) As to WBI, the trial court concluded that the 1979 collective bargaining agreement governed Penman's employment, and that because Penman had

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[1] WBI went to trial on the remaining issues and successfully brought a motion for nonsuit.

elected not to exhaust the grievance and arbitration procedure provided in the contract, he could not state a claim for wrongful discharge. As to the Union, the court found that Penman's attorney had made his own decision not to pursue arbitration, and that his decision was not the result of union conduct. Accordingly, the court granted the Union's motion for summary judgment.[2]

Penman appealed the trial court's entry of summary judgment in favor of the Union on the issues of breach of the duty of fair representation, and equitable estoppel. His fair representation argument, simply stated, was that because his discharge was arbitrable under the 1979 agreement, he was required to exhaust contractual grievance procedures; that because the Union representative gave "misleading" advice to his attorney, he failed to exhaust those procedures; and that the Union's offer of bad advice was therefore a breach of its duty of fair representation. Penman also argued that because of the alleged misrepresentation, the Union should be equitably estopped from contend-

---

[2] For reasons unclear from the record, the trial court, simultaneous with the summary judgment, granted Penman's motion for leave to file a second amended complaint against both defendants. This potentially confusing action was clarified by an almost immediate grant of a second summary judgment in favor of the Union, based upon the second amended complaint. The second amended complaint differed from the first in that it added a cause of action for equitable estoppel against the Union. For present purposes, the Union will treat the trial court's action as a single judgment based upon the totality of the allegations directed against the Union in both the first and second amended complaints.

ing that he was required to exhaust contractual procedures.

The Court of Appeal rejected both arguments. It wrote:

> "At most, St. Johns was negligent. While St. Johns did not have a copy of the final version of the 1979-1982 agreement when he wrote the December 18 letter to Lowe, he was an experienced business agent and in fact, signed the agreement on behalf of the Union. However, as pointed out *ante*, had St. Johns had a copy of the 1979-1982 agreement, he may have been as confused as we were by its provisions. He may have concluded the "discharge for cause" language in Article 7 was inserted by mistake because it did not relate to any other language in the 1979-1982 agreement and so informed Lowe. From this record, there is no reason to believe St. Johns would not have forwarded a copy to Lowe for Lowe to scrutinize in a lawyer-like manner on behalf of his client as soon as one was available. While St. Johns' interpretation was misleading, there was no showing of fraudulent concealment, or of unfair, dishonest or agregious conduct by him. Therefore, there was no breach of duty of fair representation.
>
> Further, these facts do not support any recovery by Penman against the Union pursuant to the doctrine of equitable estoppel. Even if we were to conclude such an alternative theory were available to Penman

> pursuant to *Hass v. Darigold Dairy Products Co.* (9th Cir. 1985) 751 F.2d 1096, 1099-1100, the elements thereof do not exist on this record. . . .
>
> Penman had *no case* in the beginning, and it did *not* get any stronger as it progressed."

(Petition, pp. A-16 — A-17) (emphasis in original)

The Court of Appeals' decision also contained dicta concluding that the applicable collective bargaining agreement did not protect Penman from at will discharge. (Petition, p. A-10) Because Penman evidently believes that such a conclusion would have supported a reversal of the trial court's dismissal of the state law wrongful discharge claims due to federal preemption, and because Penman did not appeal that issue, he is understandably frustrated. This frustration evidently led to his petition for review before the California Supreme Court. The Court, en banc, summarily denied review. Penman now seeks review before this Court based upon the same allegations of error.

SUMMARY OF ARGUMENT

None of the traditional reasons for granting certiorari are present in this case. The California Court of Appeal has applied well settled federal precedent to an undistinguished set of facts. There is no conflict between the decisions of state and federal courts, nor between circuit courts. There is nothing here but obedient and predictable fidelity to the principles and precedents of federal labor law.

Nonetheless, Petitioner has attempted to recast his arguments as questions of importance to this Court. His first argument is that the Court of Appeal has denigrated the federal labor policy in favor of arbitration by holding that Penman had no substantive right to arbitration. What Penman fails to note, however, is that the question of whether or not his discharge was arbitrable goes primarily to the issue of whether or not federal law required him to exhaust the grievance and arbitration procedure provided by the collective bargaining agreement as a prerequisite to suit against the employer.

Thus while it is true that the trial court found that exhaustion was required, it did so in connection with Penman's claims against his employer, WBI. WBI was not a party to the appeal, and neither the trial court's decision on WBI's motion for summary adjudication, nor the Court of Appeal's comments about that portion of the lower court's minute order are appropriate issues for review.

The Court of Appeal affirmed a summary judgment in favor of the Union on the issues of breach of the duty of fair representation, and equitable estoppel. On the breach of duty of fair representation issue, the Court affirmed on the basis of a specific finding that, under the governing standard, the Union's conduct did not constitute a breach. This conclusion was independent of any opinion as to the potential for success in arbitration on the merits of the grievance. The Court's decision was limited to a straightforward application of clear federal precedent; its discussion of the arbitrability of Petitioner's grievance was unnecessary to its

decision and does not present an issue for review by this Court.

In a further attempt to create an issue for review, Penman suggests that the Court of Appeal applied the standard used by the Seventh Circuit in judging union conduct when the preferred standard is that employed by the Ninth Circuit. Had the Court of Appeals applied the rule of *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983), Penman argues, "the result would clearly have been in favor of Petitioner." (Petition, p. 23) Petitioner is confused.

First, it is evident from the Court of Appeal's opinion that the decision is based upon Ninth, rather than Seventh Circuit caselaw. (Petition, p. A-13 — A-16) Second, Petitioner misreads *Dutrisac*. That case imposes liability upon unions for unexplained failures to perform ministerial acts such as meeting deadlines for the filing of grievances. 749 F.2d at 1274. It specifically shields unions from liability for errors of judgment. *Id.* at 1273. Here it is undisputed that the union facilitated arbitration for Penman, but that Penman's attorney chose not to proceed. The only "misconduct" alleged is the union's arguably mistaken interpretation of the contract. Because contract interpretation is an exercise of judgment, *Dutrisac* does not apply. See *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), cert. den., ___U.S___, 106 S.Ct. 1642, 90 L.Ed. 2d 187 (1986).

Penman also continues to dispute evidentiary issues. Throughout this litigation, he has regarded the Union's arguably confusing interpretation of the contract communicated to Lowe as violative of the Union's duty

of fair representation. The caselaw, however, does not support Petitioner's belief. See, e.g., *Peterson, supra.*

Similarly, Penman has consistently viewed an employer memo containing unsubstantiated statements regarding the Union "going through the motions" as solid evidence of a "diabolical conspiracy" to foil Penman's efforts in arbitration. If, as Penman charges, the lower courts ignored the memo in deciding the case, such exclusion from consideration was an appropriate response to hearsay. See California Code of Civil Procedure § 437(d); California Evidence Code § 1200. Further, assuming that the Union representative was unenthusiastic about the merits of the grievance, the undisputed record evidenced consistent cooperation and assistance from the Union, and would not support a finding of bad faith.

Penman's last argument is that the Court of Appeal failed to decide the question of whether or not Penman was entitled to recover on a theory of equitable estoppel. But the Court did decide this issue. It concluded that the undisputed facts did not satisfy the elements of the doctrine. Having reached that conclusion, it was unnecessary to determine the viability of the theory in the abstract. Again, there is no basis for a grant of certiorari.

For all of these reasons then, Respondent Union respectfully requests that the Court deny the Petition.

ARGUMENT

I

THE COURT OF APPEAL'S DISCUSSION OF SUBSTANTIVE ARBITRABILITY IS IRRELEVENT TO THE VALIDITY OF ITS DECISION

Penman's challenge to the Court of Appeal's conclusion that his grievance was not arbitrable is easily explained. Inherent in his argument is the assumption that had the trial court reached the same conclusion, he would have been able to maintain state law wrongful discharge claims. While this may be true, and it may be frustrating, it leads nowhere.

Penman did not appeal the trial court's dismissal of his tort claims. Instead, he accepted and conceded the effect of federal preemption under *Allis-Chalmers Corporation v. Lueck*, 471 U.S. ___, 105 S.Ct. 1904 (1985), and his failure to exhaust contractual remedies as required by *Republic Steel Corporation v. Maddox*, 379 U.S. 650, 653, 85 S.Ct. 614 (1985). He appealed only the judgment entered in favor of the Union, and limited the issues to equitable estoppel and a breach of the duty of fair representation theory based on the Union's alleged "derailment" of his grievance by what he saw as intentional misrepresentation.

The question, then, is the significance of the Court of Appeal's observation that Penman did not have an arbitrable grievance. The answer is that it is of no significance. It is not necessary to the affirmance; it is, in the Court of Appeal's own words, "surplusage".

In discussing arbitrability in a wrongful discharge/ breach of duty of fair representation action, there are two possible conclusions. If the grievance is arbitrable, the grievant must exhaust contractual procedures prior to bringing suit directly against the employer. *Republic Steel, supra.* If it is not arbitrable, there is no exhaustion requirement. In either case, the exhaustion analysis goes to the question of whether or not the employee may sue the employer directly, and does not aid a decision as to a union's culpability.

Penman nonetheless seeks to eradicate the Court of Appeal's discussion suggesting that exhaustion might not have been required. His reasons are clear. If his grievance was not arbitrable, the Union's alleged misconduct could not have resulted in harm, and even a reversal of the Court's holding on the liability issue would not result in damages. See *San Francisco Web Pressmen & Platemakers No. 4 v. NLRB*, 794 F.2d 420, 423-24 (9th Cir. 1986) (no back pay award where there was no showing that the grievant would have prevailed had the grievance gone to arbitration).

Moreover, if Penman did not have to exhaust his contractual remedies, neither did he have to attempt to establish a breach of the Union's duty as an excuse for his failure to do so. See generally, *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). For Penman, the exasperating conclusion to be drawn from the Court's gratuitous discussion of arbitrability is that he should have appealed the judgment entered in favor of the employer, argued against coverage by the collective bargaining agreement, and pursued the state law wrongful discharge claims forfeited in this appeal.

Penman chose the opposite path, and it is not for this Court to indulge Petitioner's revisory desires.

II

THE COURT OF APPEAL PROPERLY APPLIED THE GOVERNING STANDARD FOR BREACH OF THE DUTY OF FAIR REPRESENTATION CLAIMS

Although Petitioner has tried to manufacture a circuit split in an effort to state a basis for certiorari, no such conflict exists. The Court of Appeal did not, as Penman seems to believe, apply the Seventh Circuit's standard requiring a showing of intentional union misconduct. The Court relied upon decisions of this Court, and of the Ninth Circuit. (See Petition, Appendix A) Penman's argument that reliance upon Ninth Circuit precedent would have yielded a different result is therefore somewhat mystifying. Nonetheless, because Penman places his confidence in cases such as *Dutrisac v. Caterpillar Tractor Company*, 749 F.2d 1270 (9th Cir. 1983), the Union will address the question of the governing standard and its application to the facts of this case.

A. The Union's Duty of Fair Representation Was Deactivated By Attorney Lowe's Representation of Penman.

Although both the trial court and the Court of Appeal concluded on the basis of undisputed facts that the Union had not breached its duty of fair representation, it is not entirely clear that the Union's

duty of fair representation was triggered by the specific facts of this case. The duty exists because of the exclusive nature of a union's representational role. *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192, 65 S.Ct. 226 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681 (1953).

When a union is the unavoidable intermediary between an employee and a remedy, the exclusiveness of the union's role generates a corresponding duty of fairness. Thus, when the question is one of access to contractual procedures available only to union representatives, the duty comes into play. See generally, *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). But when the union does not have exclusive access to a given procedure, and the represented employees themselves have the right to seek relief, the duty does not apply. See e.g., *Eichelberger v. NLRB*, 765 F.2d 851, 856-857 (9th Cir. 1985).

Here, at Penman's request, the Union permitted a private attorney to take over representation of Penman in the handling of his grievance. As a legal matter, then, because the Union in the specific circumstances of this case was not to be the exclusive representative of the employee, either in the grievance procedure or at arbitration, there is no statutory or common law duty on the part of the Union. This was, in essence, the conclusion of the trial court when it found that the decision of Penman's counsel not to arbitrate was a "conscious decision" based on the merits of the claim, rather than a result of Union misrepresentation. Likewise, the Court of Appeal found that "as an afterthought, [Penman] sought to shift the blame to the Union, and excuse his non-compliance with a

contention that the Union breached its duty of fair representation to him." The responsibility, the lower courts concluded, lay with Petitioner.

B. Federal Law Does Not Impose Liability For Errors Of Judgment.

Assuming, however, that the duty of fair representation was fully applicable, federal case law leaves no question but that the Union did not breach it duty. The essence of Penman's Complaint against the Union is that the Union allegedly gave incorrect information to Penman's attorney regarding the contents of the new collective bargaining agreement retroactively applicable to Penman's discharge. Without discussing the details of the contract or the merits of Penman's grievance, we will assume for the purposes of argument that the Union representative misinterpreted the terms of the new contract.

The result is the same. The Court of Appeal relied on valid, mainstream federal precedent to find that if the Union had given the wrong information to Penman's counsel, it was at most the result of negligence, and that mere negligence does not constitute a breach of the duty of fair representation. (See Petition, pp. A-12 — A-16)

The validity of the Court's decision, and its consonance with the law of the Ninth Circuit as to the applicable federal standard, is illustrated by several Ninth Circuit decisions decided after those discussed by the Court of Appeal. In *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), *cert. den.* ___U.S.___, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986), the Ninth Circuit

reaffirmed its strongly held principle of deference to union conduct. In that case, a football player went to his union for advice concerning the filing of a grievance to protest being cut from his team. The player's contract contained two separate grievance procedures, one for injury grievances, and one for non-injury grievances. An attorney for the union advised the player that he should pursue the injury grievance. In reliance upon the attorney's advice, the player relinguished the non-injury theory in favor of the injury theory.

The advice was wrong. As things turned out, the correct approach would have been to file a non-injury grievance. When the mistake was discovered, it was too late; although the union tried to "rechannel" the non-injury grievance, it was dismissed as untimely. As a result of the union's error, the player lost all opportunity to pursue a viable grievance.

The Court upheld the judgment entered in favor of the union. After reviewing the development of the duty of fair representation standard in the Ninth Circuit, the Court discussed the policy supporting the generous measure of deference granted to unions:

> "Sound policy reasons militate against imposing liability on unions for errors in judgment made while representing their members in the collective bargaining process. . . . [H]olding unions liable for such errors would serve ultimately to 'defeat the employees' collective bargaining interest in having a strong and effective union.' If unions were subject to liability for 'judgment calls', it would necessarily undermine their discretion to act on

> behalf of their members and ultimately weaken their effectiveness. . . . Such a result would be inconsistent with our oft-repeated commitment to construe narrowly the scope of the duty of fair representation in order to preserve the unions' discretion to decide how best to balance the collective and individual interests that they represent."

771 F.2d at 1255. There is therefore no longer any question but that a union's good-faith efforts to fairly represent its members — even if negligent, and even if they involve poor judgment — cannot result in liability.

Additional support for the same proposition is found in the recent case of *Scott v. Machinists Automotive Trades District*, 815 F.2d 1281 (9th Cir. 1987). In *Scott*, the Ninth Circuit again reviewed the case law governing the appropriate standard in breach of duty of fair representation cases. The plaintiff in *Scott* contended that the union had represented to him that the company would be offering at least $70,000.00 in settlement of his grievance; that he returned to work in reliance upon that representation; and that only $20,000.00 was actually offered. After reviewing the relevant standard, the Court wrote:

> "Even if the union representative misstated the amount Safeway intended to offer in settlement, at most this misstatement was arguably negligent. It did not rise to the level of arbitrary conduct required to establish a breach of the union's duty of fair representation. [Citing *Peterson*, supra.] It is also not clear how this misstatement prejudiced Scott's position.

> Given the narrow construction of the basis upon which breach of a union's duty of fair representation may be predicated, we hold that the District Court did not err in granting summary judgment in favor of the union."

815 F.2d at 1285.

These are the controlling principles. An error of judgment, or an act of simple negligence, does not amount to actionable misconduct. The Court of Appeal was therefore correct in affirming the trial court's grant of summary judgment.

C. This Case Does Not Fit Within The Narrow Exception Articulated In *Dutrisac*.

Penman seeks to squeeze this case within the narrow confines of *Dutrisac v. Caterpillar Tractor Company*, *supra*, 749 F.2d 1270. In that case, the union missed the deadline for filing a grievance. The union had previously judged the grievance to be meritorious, and declared its intention to pursue the matter to arbitration. *Dutrisac*, *supra*, 749 F.2d at 1273-74. The missed deadline was not a conscious act, but an unexplained accident. No judgment was involved, and the Court found liability acceptable as a means of tightening the union's control over the mechanical function of filing grievances in a timely manner. *Id.*, at 1274.

The decision itself was limited to "ministerial acts". *Id.*, at 1273. Subsequent decisions have consistently limited *Dutrisac*'s "seeming aberrance" in interjecting a negligence standard, *Eichelberger*, *supra*, 765 F.2d at 855, and have highlighted the contrast between

ministerial acts and a union's conscious exercise of judgment. *Id.*, at 855, note 7. *Accord Peterson v. Kennedy, supra,* 771 F.2d at 1254, and *Castelli v. Douglas Aircraft Company,* 752 F.2d 1480, 1482-83 (9th Cir. 1985). Because the alleged union misconduct in this case is providing an arguably misleading interpretation of the collective bargaining agreement, rather than an unexplained and severely prejudicial failure to perform a necessary task on a member's behalf, this case falls well within the range of discretion accorded unions in the performance of their representational function.

To the extent that Penman relies upon *Robesky v. Qantas Empire Airline, Ltd.*, 573 F.2d 1082 (9th Cir. 1982), that reliance is similarly misplaced. In *Robesky*, the company offered the grievant reinstatement in settlement of her grievance. Unknown to the grievant, the union had decided not to take her grievance to arbitration. In reliance upon the union's original representation that it was going to arbitration, the grievant rejected the company's offer. The Court found:

> "The union officers were fully aware of the situation. It was they who had decided prior to negotiations that appellant's grievance would not be arbitrated. It was they who had agreed to and accomplished a formal withdrawal of the grievance from arbitration as an element of the settlement. The union officers had ample opportunity to convey the critical information to appellant. . . . "

Id., at 1091.

The Union's alleged misconduct in *Robesky* was thus the unexplained failure to perform the very small task of notifying the grievant of its withdrawal of her grievance. By contrast, the misconduct alleged in this case is communication of a Union representative's best judgment as to the meaning of a new agreement which had not yet been reduced to writing. At worst, Union representative St. Johns expressed an opinion that the contract language which would be relevant to Penman's case had not changed. If that opinion was wrong, St. Johns was wrong on a matter of judgment, and federal law finds no breach of the duty of fair representation. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 571, 96 S.Ct. 1048, 1059, 47 L.Ed.2d 231 (1976); *Peterson, supra*, 771 F.2d at 1254-55.

Further, Appellant's situation differs from that in *Robesky*, in that as the trial court and the Court of Appeal both concluded, the Union in this case was extremely cooperative in helping Penman's chosen representative to prepare for and evaluate the case. Unlike the facts in *Robesky*, the Union's conduct here did not curtail Penman's right to go to arbitration. Rather, the Union undisputedly stood ready to proceed to arbitration, regardless of its view of the merits of Penman's case. It was Penman's chosen representative, Mr. Lowe, who chose an alternate path.

Thus it is not the intentional or unintentional conduct of the Union that is at issue here, but the clearly intentional and deliberate choice of Mr. Lowe. The only wrong charged to the Union by Penman is the Union's failure to disclose to Lowe a change in the new collective bargaining agreement which Penman now believes would have aided his case. Yet, in the best

judgment of the Union representative assisting Mr. Lowe, the new language was simply a repetition of an earlier provision which had been construed in arbitration decisions as ineffective to protect employees in Penman's job classification. The "new" language was therefore of no benefit to Penman. Because the Union's advice involved judgment and discretion, neither *Dutrisac* nor *Robesky* applies.

Regardless of who was responsible for the abandonment of Penman's grievance, however, the abandonment was premised on an interpretation of the collective bargaining agreement. If, as both the trial court and the Court of Appeal concluded, the responsibility lay with Mr. Lowe,[3] the Union is free from liability and affirmance of the summary judgment was correct. If, as Petitioner contends, Lowe acted in reliance upon what amounted to an incorrect

---

[3] Because the grievant's chosen representative was an attorney, that attorney may certainly be presumed competent to form his own opinion as to the viability of his client's grievance. Additionally, had Mr. Lowe waited to abandon the grievance until after a copy of the new collective bargaining agreement was prepared, he would have been in a position to independently review the new contract language. Instead, it appears from the record that Mr. Lowe chose to rely upon the provisions of Article 68(c), the only substantive section on job tenure found in the 1976 contract. Presumably, Mr. Lowe's theory crumbled when the Union informed him that Article 68(c) was deleted from the new Agreement. Because Mr. Lowe apparently did not find the non-Article 68(c) "discharge for cause" provision in the 1976 Agreement a sound basis for argument, the record leaves very little doubt but that Mr. Lowe would have agreed with the Court of Appeal and found no *substantive* right to discharge only for cause in the relocated 1979 reference to "discharge for cause" found in the procedural language of the amended Article 7.

interpretation of the new contract, summary judgment was still the correct resolution of the case, in that federal law grants unions the discretion to make errors of judgment without liability. *Peterson, supra*, 771 F.2d at 1255.

D. Penman's "Evidence" Of Intentional Union Misconduct Does Not Affect The Correctness Of The Court Of Appeal's Decision.

Penman offers as "evidence" of the Union's alleged bad faith a memo from one employer representative to another, in which the former tells the latter that the Union representative is "going through the motions" of the grievance procedure. Petitioner's allegation of error is that the trial court, and later, the Court of Appeal, ignored the significance of this memo. If the lower courts did ignore the memo, they were simply following the law. Its contents are inadmissible hearsay under California Evidence Code Section 1200, and the California Code of Civil Procedure, Section 437(d), requires courts to consider only admissible evidence on motions for summary judgment.

Moreover, even assuming that the courts considered, and then rejected, the contents of the memo, such action is appropriate under federal law. It is not a union representative's level of personal enthusiasm which is at issue in a fair representation action, but whether or not the union's representation was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes, supra*, 386 U.S. 171, 190; *Eichelberger v. NLRB, supra*,, 765 F.2d 851 (no breach where union's only effort was to read and reject the grievant's letter explaining her claim).

Petitioner's argument also fails because of the nature of appellate review. First, an appellate court must presume that the judgment or order appealed from was correctly decided by the trial court. *Denham v. Superior Court*, 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 69 (1970); *Walling v. Kimball*, 17 Cal.2d 364, 373, 110 P.2d 58, 63 (1941). The appellate court must adopt all inferences to affirm the judgment unless the record expressly contradicts them. Thus, unless the record affirmatively demonstrates the error, the appellate court must presume that the evidence and findings support the judgment, *Kompf v. Morrison*, 73 Cal.App.2d 284, 166 P.2d 350 (1946), and that that trial court based its decision on appropriate findings and disregarded incorrect or insufficient ones. *Brewer v. Simpson, supra*, 53 Cal.2d 567, 583, 2 Cal.Rptr. 609, 616.

In this case, the trial court held that:

> "There is no triable issue as to the material facts that the failure of Plaintiff through his attorney to complete the grievance procedure provided by the Collective Bargaining Agreement was a conscious decision based upon an evaluation of the chances of success of the claim and was not based on any matters stated by Union representatives or any delay in obtaining a copy of the 1979 Collective Bargaining Agreement."

(Petition, p. B-2)

Accordingly, the Court of Appeal was to extend great deference to the conclusion that no material factual issues remained. Nevertheless, the Court of Appeal specifically and independently refuted Appellant's argument to the contrary:

> "Penman's argument continues to the effect that a question remains as to whether Lowe's failure to take the case to arbitration was based upon a 'conscious decision' as found by the trial court, or was caused by St. Johns' false and fraudulently misleading advice.
>
> However, Penman's insistence that the Union breached its duty of fair representation to him through St. Johns' interpretation of the new Agreement is without justification. Simple negligence or errors in judgment on the part of a union are insufficient to support a breach of the union's duty of fair representation."

(Petition, p. A-12)

Inherent in the decisions of both lower courts is the conclusion that the alleged "evidence" of bad faith reviewed by each was insufficient to convince either court of the existence of a breach. Both concluded, as a matter of law, that no material factual issues remained and that on the basis of the undisputed record, summary judgment was appropriate. This conclusion is consistent with federal case law. See *Peterson, supra,* 771 F.2d 1244, and *Scott, supra,* 815 F.2d 1281.

Because the memo did not contain admissible evidence; because "going through the motions" is not actionable misconduct; and because the Court of Appeal adhered to both substantive federal law and the relevant state law standards for appellate review, Penman's bad faith argument fails to state a basis for a grant of certiorari.

III

THE COURT OF APPEAL ACTED CONSISTENTLY WITH FEDERAL LAW WHEN IT AFFIRMED SUMMARY JUDGMENT ON THE ISSUE OF EQUITABLE ESTOPPEL

The federal doctrine of equitable estoppel has four elements: (1) the union must have been aware of the true facts; (2) the union must have intended its misrepresentation to be acted upon or acted so as to confer a reasonable belief that it was so intended; (3) plaintiff must have been ignorant of the true facts; and (4) plaintiff must have detrimentally relied upon the union's misrepresentation. All four elements assume the falsehood of factual information given to an employee by a union.

In theory, the doctrine may be used to impose liability. In *Acri v. International Association of Machinists and Aerospace Workers*, 781 F.2d 1393 (9th Cir. 1986), union representatives told striking members that the company had agreed to remove the existing limit on severance pay. The membership ratified the new contract. Later, the membership realized that the company had not agreed to change the severance pay provisions. There was no breach of the duty of fair representation because plaintiffs could not prove that they would have voted differently had there been no misrepresentation, nor that the company would have agreed to the requested severance pay provision had the vote been different.

Similarly, there was no liability under an estoppel theory because the plaintiffs could not demonstrate

that they had relied on the misrepresentation to their detriment. The Ninth Circuit therefore upheld the summary judgment of the lower court on both theories.

Appellant had similar proof problems here. The undisputed record shows that:

(1) Lowe had a copy of the 1976 Agreement containing a provision concerning "discharge for cause";

(2) The Union gave Lowe copies of arbitration decisions discussing non-Roster employees' contractual rights upon discharge;

(3) The Union truthfully informed Lowe that the phrase "discharge for cause" contained in Article 63(b) of the 1976 Agreement was now included in the grievance and arbitration provisions of Article 7 of the new Agreement;

(4) The Union truthfully told Lowe that Section 68(c) of the 1976 Agreement had been eliminated in the 1979 Agreement and that the new Article 7 governed Penman's rights;

(5) Lowe made an independent evaluation of the merits of Appellant's grievance, and concluded that arbitration would be futile.

The doctrine of equitable estoppel thus has no application. Although the Union was aware of the true facts, i.e., that certain language had been deleted and other language rearranged, Lowe was also aware of the true facts. *There was no deception.* Because there was no misrepresentation, there was no mistaken reliance. The Court of Appeal correctly concluded that elements of the doctrine do not exist on the record.

CONCLUSION

For all the reasons set forth herein, Respondent Publicists Guild, Local 818, IATSE, respectfully requests that Penman's Petition for Writ of Certiorari be denied.

Dated: December 10, 1987

Respectfully submitted,

LEO GEFFNER
TAYLOR, ROTH,
BUSH & GEFFNER
Counsel for Respondent

TERRI A. TUCKER
Appellate Counsel

PROOF OF SERVICE BY MAIL

State of California

ss.

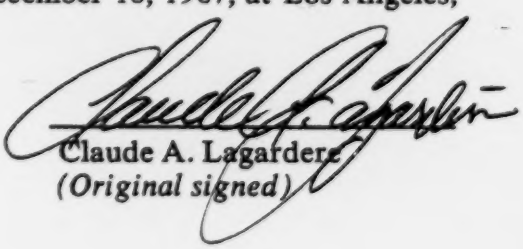
County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on December 10, 1987, I served the within *Respondent's Brief in Opposition To Petition For Writ Of Certiorari To The Court Of Appeal Of The State of California, Second Appellate District, Division Three* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

Charles Theodore Mathews, Esq.
William D. Evans, Esq.
Mathews and Evans
Attorneys at Law
3424 Wilshire Blvd.
Suite 1000
Los Angeles, CA 90010
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 10, 1987, at Los Angeles, California.



Claude A. Lagardere
(Original signed)

No. 87-794

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

CHARLES PENMAN,

Petitioner,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA AND THE PUBLICISTS, LOCAL 818,

Respondent.

On Appeal from the Supreme Court of California

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

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Respondent's attempts to evade liability in its Opposition runs the gamut from a denial that the international union was "never a party" to this lawsuit 1/ all the way to the baseless contentions that the arbitrability issue involving the 1979-82 Agreement is "unnecessary to" this Court's decision (Opp. pp. 8-9), that the evidence of the conspiracy between the Respondent

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1/ The international union and its Local 818 (Tr. 3) were named in the First Amended Complaint and the designation has appeared consistently in all Petitioner's papers since then. They are referred to collectively as they always have been, as "Respondent".

and WBI is objectionable hearsay (Opp. pp. 10, 22) and that, in any event, St. Johns committed no more than an innocent error of judgment. (Opp. pp. 15-22). These transparent attempts to establish innocence in the light of the patently bad faith revelations summarized in the Petition only focuses more clearly on Respondent's guilt.

I.

THE QUESTION OF THE 1976-1979 AGREEMENT'S SUBSTANTIVE ARBITRABILITY OF PENMAN'S DISCHARGE IS MATERIAL TO RESPONDENT'S MISREPRESENTATIONS.

Respondent's attempt to defend the Court of Appeal's faulty interpretation that the insertion of "including discharges for cause" into Article 7, the grievance procedure provision, where no such language existed before had absolutely no substantive affect on WBI's duty to arbitrate discharge grievances and its attempt to prop up the conclusion that the new language in Article 7 "should not be entitled to any significance" (Pet. A-10, l. 8) is a vain attempt to escape the admonition repeated again and again by this Court that "[d]oubts (about arbitrable disputes) should be resolved in favor of coverage." Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960). The substantive arbitrability of Penman's discharge is absolutely essential to making a finding of Respondent's bad faith. Penman's attorney, Lowe, had become convinced that under the 1976-79 Agreement an arbitrator would find no basis to hold that his discharge greivance was even arbitrable because of Penman's absence from the Industry Experience Roster. Had Lowe known that the dramatic change in the wording of Article 7 provided for all discharges to be tested by cause, he need not worry any more about his concern for Penman's lack of status with the Roster. Knowing then that Penman must exhaust his arbitrable

rights, under the 1979-82 Agreement, he would have certainly opted for arbitration rather than for a state law wrongful discharge suit that would be preempted. Accordingly, the change in Article 7 was a material change and Lowe would be expected to notice that change. Because of St. Johns' representation that there was "no substantial change in the Charles Penman situation" was a material misrepresentation, it had a substantial effect on Penman's arbitration rights.

II.

RESPONDENT VIOLATED VACA V. SIPES UNDER BOTH THE SEVENTH AND NINTH CIRCUIT STANDARDS.

A. The Court of Appeal Ignored the Rule in Dutrisac v. Caterpillar Tractor Co. and Other Ninth Circuit Precedent.

Respondent insists that the Court of Appeal followed Ninth Circuit law. (Opp. p. 13). While the opinion below cited Dutrisac v. Caterpillar Tractor Company, 729 F.2d 1270 (9th Cir. 1983) and other Ninth Circuit cases, it is manifest that the Court of Appeal did not really apply the Ninth Circuit rules enunciated by Dutrisac and its predecessor, Robesky v. Quantas Empire Airline, Ltd., 573 F.2d 1082 (9th Cir. 1982). Nowhere was there an analysis of the presence of "reckless disregard", or "severe prejudice" of Penman, or serving the policies "shielding the union from liability". (Robesky, 573 F.2d at 1090) or the "unexplained and unexcused" conduct of St. Johns (Dutrisac, 749 F.2d at 1273). Nor was there any analysis made as to whether there was a "ministerial act" involved, as opposed to an "exercise of judgment". Zuniga v. United Can Co., 812 F.2d 443, 451 (9th Cir. 1987). Because the Court of Appeal ignored all these tests, rushed to judge St. Johns' conduct as merely errors

in judgment based on contract misinterpretations, and dismissed the case based on St. Johns' "simple negligence" (Pet. pp. A-14 - 16), whether or not it said so, it really applied the stricter standards of the Seventh Circuit, not the Ninth Circuit tests, and rejected Penman's arguments because it failed to find "intentional fraud". (Pet. pp. 21-22).

B. St. Johns' Guilt Did Not Involve Contract Misinterpretation.

Respondent desperately attempts to seek refuge for St. John in terming his misrepresentation of the 1979-82 Agreement as his "best judgment of the meaning of a new agreement not yet reduced to writing" (Opp. p. 20). However, Respondent ignores the fact that the Memorandum of Agreement highlighted the Article 7 change as paragraph 7, one of 14 enumerated changes (besides wage scale changes) and that 5 out of 6 employer representatives executed said document on December 17, 1979, one day before St. Johns' misleading December 18, 1979 letter. (Tr. 452-458). There is no basis for any innocent confusion here. This was not a matter of contract interpretation or poor exercise of judgment; it was "reckless disregard" on St. Johns' part which "severely prejudiced" Penman which went "unexplained and unexcused". Arbitrary conduct and bad faith are rampant, if the Ninth Circuit test is used.

C. Gary's Evidence of Respondent-WBI Complicity is Subject to Hearsay Exceptions.

Respondent's final attempt to seek a safe harbor for St. Johns' conduct is to argue that the WBI interoffice memorandum from Gary to Ballance repeating St. Johns' assurances that Respondent will only go "through the motions" for Penman and that Respondent is "supporting us, and has all along" (Tr. 468-470) is

objectionable hearsay. (Opp. pp. 10, 22). However, Gary adopted and affirmed the statements in her deposition testimony. (Tr. 469-471). Gary's testimony that St. Johns uttered these statements, while hearsay, would be clearly admissible under at least two hearsay exceptions: (1) as an admission on St. Johns' part (California Evidence Code, Section 1220) and (2) as evidence of St. John's then existing state of mind (California Evidence Code, Section 1250). Of course, Respondent neglected to explain how the St. Johns-Lowe-Penman correspondence wound up in WBI's personnel file dealing with Penman as there is no defense to this violation of confidence. With this supporting evidence, Respondent's conduct was intentional fraud directed and focused on Penman so that even the stricter Seventh Circuit test of "bad faith" was satisfied here.

For all the above reasons, Lowe was clearly duped. Without a true picture of the terms of the new agreement before him, it could hardly be said that he made a "conscious decision" not to go to arbitration. Likewise, any conclusion by Lowe that he thought resort to arbitration was futile (Opp. p. 4) was arrived at without adequate data. And irrespective of whether Lowe as an attorney should not have allowed himself to be duped, he should have been able to place some trust in his client's union which owed him a "fiduciary obligation" as his collective bargaining representative. Brady v. TWA, Inc., 401 F.2d 87, 94, fn. 18 and cases cited therein, (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969)

III.

RESPONDENT IS ALSO GUILTY OF EQUITABLE ESTOPPEL RESPECTING ST. JOHNS' MISREPRESENTATION.

Notwithstanding all of the above, Respondent denies it gave Lowe any false information. After giving Lowe copies of the

1976-79 Agreement and copies of arbitration decisions interpreting the old agreement unfavorably to Penman, while Respondent informed Lowe that Article 68(c) was eliminated, Respondent parted company with the truth and with its duty to deal with its member in good faith. It failed either to provide Lowe after his requests with a copy of the 1979-82 Agreement vital for his needs and then threw out a smoke screen by lying to him that "there is no substantial change in the Penman situation" because of the amended contract. Clearly, Penman and Lowe relied on the misrepresentation to their detriment. Respondent must now answer for it.

CONCLUSION

Respondent's Opposition not only is unsuccessful in concealing the weaknesses in its position but also it lays open the serious errors on the part of the California courts in misapplying federal labor policy. To undo these errors, this Honorable Court should now grant this Petition, clarify whatever rules should apply and remand this case back to the California Superior Court for trial.

Dated at Los Angeles, California, this 31st day of December, 1987.

Respectfully submitted,

CHARLES PENMAN

By: 

*CHARLES THEODORE MATHEWS
WILLIAM D. EVANS
MATHEWS & EVANS
Attorneys for Petitioner

*Counsel of Record

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and am not a party to the within action; my business address is: 3424 Wilshire Boulevard, Suite .000, Los Angeles, California.

On December 31, 1987, I served the within Reply To Respondent's Brief In Opposition To Petition For a Writ of Cetiorari To the Court of Appeal Of The State Of California, Second Appellate District, Division Three;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Leo Geffner
Geffner, Goldstein & Paule
3055 Wilshire Boulevard, Suite 900
Los Angeles, California 90010

Terri A. Tucker
6363 Wilshire Boulevard, Suite 228
Los Angeles, California 90048

All required parties have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 31, 1987, at Los Angeles, California.

Tina Hamilton
TINA HAMILTON